IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12 - 1159

RAY J. JACKSON,

Appellant

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, STATE OF FLORIDA
Lower Tribunal No. 2005-32590-CFAES

INITIAL BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

This is an appeal of a final order by the Circuit Court of the Seventh Judicial Circuit, in and for Volusia County denying relief to the Appellant, Ray J. Jackson ("Jackson"), upon his Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851. The record on appeal for the trial proceedings consists of 34 volumes and 1 volume of exhibits. The record on appeal for the post-conviction proceedings consists of 16 volumes. The record on appeal for the trial proceedings will be referred to as "(RV __)" followed by the appropriate volume number and then page number(s). The post-conviction record on appeal will be referred to as "(PV____)" followed by the appropriate volume number and then page number(s). All other references will be self-explanatory or otherwise explained.

REQUEST FOR ORAL ARGUMENT

Jackson is incarcerated, Union Correctional Institution, Raiford, Florida, under a sentence of death. The resolution of these appellate issues will determine whether Jackson lives or dies. This Court has allowed oral argument in other capital cases. A full opportunity to air the issues would be appropriate given the seriousness of the claims involved and the fact that a life is at stake. Jackson accordingly requests that this Honorable Court permit oral argument.

STATEMENT OF THE CASE

(A) Statement of the case pertaining to the trial proceedings.

Jackson was indicted on May 3, 2005, for the first degree murder and kidnapping of Pallis Paulk ("Paulk"). (RV1, 5-6). Michael Wooten ("Wooten"), Jackson's co-defendant, was indicted in a separate indictment also for first degree murder and kidnapping. Frederick Hunt ("Hunt") was also charged with kidnapping. Jackson was represented by Gerard Keating and Philip Bonamo ("Keating" and "Bonamo").

The voir dire was conducted from April 9, 2007, to April 12, 2007. The guilt phase was conducted from April 13, 2007, to April 19, 2007. On April 20, 2007, Jackson was found guilty on all counts. (RV25, 1469-1470). The penalty phase was conducted from May 7, 2007, to May 9, 2007. On May 9, 2007, the jury recommended a death sentence by a vote of 9 to 3. (RV30, 650-653). The trial court conducted a *Spencer* hearing on June 15, 2007. (RV15, 2387-2419). On June 21, 2001, the trial court sentenced Jackson to death for the murder and to life for the kidnapping, to run consecutively. (RV4, 704-712 & RV15, 2443-2444). The trial court filed a written Sentencing Order, the sentencing hearing. (RV4, 696-703). In the Order, the trial court found 3 statutory aggravators, no statutory mitigators and 12 non-statutory mitigators. (RV4, 697-702) & *see Jackson v. State*, 25 So.3d 518, 525, n.8 (Fla. 2009).

(B) Statement of the case pertaining to the direct appeal proceedings

Jackson filed a notice of appeal on July 2, 2007, which was denied on September 24, 2009. *See Jackson*, 25 So.3d 518. Thereafter, Jackson filed a petition for writ of certiorari to the Supreme Court of the United States which was denied on June 14, 2010. *See Jackson v. Florida*, 130 S.Ct. 3420 (2010).

(C) Statement of the case pertaining to the post-conviction proceedings

Jackson filed a Motion for Post-Conviction DNA testing pursuant to Florida Rule of Criminal Procedure 3.853, and an Amendment to the Last Known Location of the Evidence to be Tested. (PV10, 1360-1424 & 1462-1467). A hearing was conducted by the court on May 26, 2011. (PV1, 1-48). The court orally pronounced its order denying Jackson's Motion and on July 1, 2011, entered a written order denying DNA testing. (PV1, 30-34 & PV12, 1685-1689).

Thereafter, Jackson filed his Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851 on April 12, 2011, putting forth 23 claims. (PV11, 1475-1590). The State filed a Response on May 27, 2011. (PV11, 1606-1643). At the case management conference the court orally announced its ruling granting an evidentiary hearing as to claims 1, 3, 4, 6, 10, 11, and 17. (PV1, 53, 75-86, 93, 95-105 & 110). The court reserved ruling on the legal claims 8, 9, 14, 15, 16, 20, 21, 22, and 23. (PV1, 63). The court orally announced its denial of an evidentiary hearing as to claims 2, 5, 7, 12, 13, 18, and

19. (PV1, 64-75, 86-93, 93-94 & 105-118). The court issued a written order dated August 22, 2012. (PV12, 1713-1715). The evidentiary was conducted from December 6, 2011, to December 8, 2011, and oral closing arguments were scheduled for December 28, 2011. The court did not order a transcript of the hearing upon the conclusion of the hearing and prior to its oral ruling. *See* Fla.R.Crim.P. 3.851(f)(5)(D)(2011).

On December 28, 2011, Jackson delivered his closing argument and filed a written Defendant's Closing Arguments. (PV7, 854-142 & PV8, 1020-1035 & V16, 2425-2501). The State also delivered its closing arguments and despite their objection to written closing arguments, they filed a written Closing Argument After Evidentiary Hearing on Rule 3.851 Motion. (PV8, 992-1020 & PV15, 2031-2424). Thereafter, the court recessed from 2:28 pm to 2:45 pm, when it orally announced its denial of the remaining claims. (PV8, 1038). A written order denying relief was later filed. (PV8, 1038-1078 & PV16, 2503-2528). Jackson filed his Notice of Appeal on May 29, 2012. (PV16, 2530-2569).

STATEMENT OF THE FACTS

(A) Statement of the facts of the trial proceedings

Jackson would rely on this Court's direct appeal opinion in *Jackson v. State*, 25 So.3d 518 for the statement of the facts of the trial. The evidence from the guilt phase was summarized by this Court in *Jackson*, 25 So.3d 518 from pages 522 to

524 of its opinion. The evidence presented, the penalty phase was summarized by this Court in *Jackson*, 25 So.3d 518 from pages 524 to 526 of its opinion.

(B) Statement of the facts of the evidentiary hearing conducted during the post-conviction proceedings

Jackson presents the following statement of facts as to the evidence presented at the evidentiary hearing in accordance with each claim that is being raised in this appeal.

i. Evidence presented as to Claims 1, 6, 11, and 17.

Claim 1 argued that counsel failed to properly investigate and to present Lewis' testimony to contradict that the victim was last seen alive on November 9, 2004. (PV2, 153-180). The victim's ***brother***, Curtis Eugene Lewis Jr. ("Lewis"), testified in support of this claim. Lewis grew up with his sister and "had a pretty good relationship" and they went to the same schools. (PV2, 154-155). He lives with their grandmother in Daytona Beach. (PV2, 156). Around his sister's disappearance, Lewis had a relationship with Paulk and would see her "like once a month," and he would talk to her "[p]robably once every other week." (PV2, 155).

After his sister's body was found, Lewis spoke to law enforcement and provided them the following ***hand-written statement under oath*** on April 17, 2005, [Defense Exhibit 1]:

> "The last time I saw pallis was ***A week after my birthday of November 6*** In the park Harlem park by bethune Cookman she was in a green lumina newer model with a Male person with dredlocks. she

would usually Call me, least once every two weeks but I have not heard or Seen her Since then."

(PV2, 160-161 & PV13, 2014). Lewis confirmed his date of birth as ***November 6, 1977***. (PV2, 154). He testified that he told law enforcement that "[t]he last time [he] saw Pallis ***was a week*** after [his] birthday." (PV2, 163). He was certain that he saw his sister a week after his birthday and not on November 7, 2004; because he was ***certain*** that he went to church on that day. (PV2, 164-166). Since Lewis only worked on the weekdays, he would not have seen Paulk during the work-week. (PV2, 166). The events at Bethune-Cookman Park would occur on the weekends. (PV2, 166-167). Lewis was certain that the last time he saw his sister "***was the 14th because it was a Sunday. It was a Sunday***." (PV2, 167).

Lewis detailed his last meeting with his sister at Harlem Park. (PV2, 163). He saw his sister in a newer model "greenish-like Lumina with some guy with ***dreadlocks***." (PV2, 164). He testified in great detail about what transpired between them as follows:

> "And she got out, she came over and gave me a hug and told me happy birthday because she forgot, because I hadn't heard from her on my birthday. And the guy who was in the car with her, he was - - he was the driver, he got out and he walked across the street and talked to somebody he knew, and then he came over. She said his name. I can't remember his name, though. He came and introduced himself to me. And she said, like, he was a friend of hers. He was involved with one of her friends, and they were going to go pick her up, a club here because she was a dancer."

(PV2, 164). He further detailed their conversation as follows:

> "She told me - - I can't remember exactly what she said. I know that she told me happy birthday because she forgot. And I said - - when I see her then, I hadn't seen her in about - - about three weeks, two weeks prior to that, and I remember her saying, 'Happy birthday, bro. I'm sorry I couldn't get you nothing you know.' I told her don't worry about it, you know, she don't have to get me anything, but - - and she was talking to another friend of mine. He was standing by. She chatted with him a little bit. And, like I said, the guy who she was in the car with, he walked across the street and talked to somebody he knew briefly, and then he came back over where she was. He introduced himself to us. My friend - - one of my friends who was with me, he already knew him, but I didn't know him, you know, but she's like, 'This is such-and-such and, you know, he go with such-and such.'"

(PV2, 171). Lewis testified that his sister "was fine" on this day and that she "was happy." (PV2, 172). He confirmed that the man with dreadlocks was not Jackson, who he did not know, and described him as follows:

> "He was a black male about 5'10", 5'11". I'd say he was in about his mid-20s, mid-20s, had black hair. That's about all I can describe."

(PV2, 174-175).

Lewis discussed with Mr. Davis his written statement ***prior*** to trial. (PV2, 168). He testified that there were no corrections then, and there are none to date. (PV2, 174). He was told by Mr. Davis that his testimony was not needed at trial. (PV2, 169). Lewis testified that he was never deposed or interviewed by Jackson's attorneys or investigators, but he would have made himself available to talk to. (PV2, 170). During cross-examination, Lewis was unsure if he had spoken to an individual named "O'Malley," but Lewis made it clear that he did not recall

whether he did or did not. (PV2, 176-177). Lewis went on to state that he did not recall talking to a defense investigator and that he was getting questions from a lot of people which included the police, his sister's daughter's father, and an investigator that Paulk's daughter's father hired. (PV2, 178-179).

Keating, the lead counsel, also testified as to claim 1. (PV5, 461 & 592-593). He testified that he had heard the name, "Curtis Eugene Lewis." (PV5, 598). He recognized Lewis' written statement and acknowledged that he had reviewed it upon receipt. (PV5, 598-599) He acknowledged that based on the sighting by Lewis beyond the November 9th date, ***it would have put Paulk alive after the alleged date of the kidnapping and murder.*** (PV5, 598-599). Keating demonstrated the importance of Lewis' statement as follows:

> "But if I have a witness that says, ***'I saw this victim alive after Ray put her in the trunk,' that would have suited my defense very well and I would have put him on the stand.***"

(PV5, 667). He did not recall personally interviewing nor meeting with Lewis, and he did not recall showing the statement to Lewis, but he ***thought*** that he had delegated the interview to his investigator, John O'Malley ("O'Malley").n (PV5, 600-601 & 657). He did not recall being present, any purported interview of Lewis. (PV5, 601). Keating relied on a memo from O'Malley, [State's Exhibit 5] and ***O'Malley' assessment*** of Lewis' credibility. (PV5, 662-663 & PV12, 1859-1860). ***It should be noted that O'Malley did not testify at the evidentiary hearing.***

Jackson objected to the O'Malley's letters and statements to Keating as hearsay and speculation with regard to the investigations for which Keating was not present. (PV5, 659-664). The pertinent part of the hearsay memo is as follows:

> "Later that day, we contacted Lewis and he said he saw Pallis during the week after his birthday which is November 6th. He said it was not a full week after his birthday, but it was during that week probably within two or three days; he could not be exact. He said he met her, Harlem Park near Bethune Cookman College and she was in a green Lumina. He said there was a male with dreadlocks who he did not recognize driving the vehicle."

(PV12, 1859). Keating confirmed that after receiving the memo but he did not personally talk to or depose Lewis because "[he] thought that that reconciled it, that ***more than likely than not*** Lewis had seen her before - - on or before November 9th, which is November 6th plus 3 days would." (PV5, 717-719 & 720). Keating never showed Lewis his statement but he speculated that his investigator did, yet he acknowledged that he did not know what transpired during O'Malley's investigations. (PV5, 601-602 & 720-721).

During cross-examination, Keating testified that he wanted to "tread carefully with family members" because of their loss and the rule of sequestration. (PV5, 718). Yet, he acknowledged that he had deposed almost every witness in this case except Lewis and Mr. Larry Paulk, the victim's uncle. (PV5, 781). However, Keating ***spoke to Mr. Larry Paulk over the phone***. (PV5, 603-604 & 718). Keating made it clear that if Lewis had stuck with his written statement, he "***definitely***

would have used him." (PV5, 667).

Claim 6 argued that counsel presented an unreasonable defense that a serial killer who was responsible for three other deaths in Daytona Beach was possibly responsible for Paulk's death ("serial killer defense"). Captain Brian Skipper ("Skipper") was the sole witness presented in Jackson's case in chief. (RV23, 1054 & PV5, 604). Keating only relied on Paulk's high-risk lifestyle and the location of her remains to tie her to the serial killings. (RV23, 1059-1060). Keating testified, the hearing that

> "[t]he purpose was to use Captain Skipper to establish the fact that there was a serial killer, large in Volusia County, Florida, at or near the time of the killing or disappearance of Pallis Paulk so as to, perhaps, establish ***a reasonable hypothesis of innocence*** that Ray Jackson was not the killer but perhaps the serial killer was the killer of Pallis Paulk."

(PV5, 604). Keating testified that he recalled having ***maybe a five minute phone*** conversation with Skipper prior to trial and that "neither the State Attorney nor the Daytona Beach Police Department really wanted [him] to - - to get into the serial killer because it was an ongoing investigation, so they were very circumspect in the information they would give." (PV5, 605-606). Keating was given "some limited information" and he "tried to establish general parameters or similarities between Pallis Paulk with her being - - may she rest in peace - - being a prostitute and her body being found in a location where other victims of the serial killer had been found." (PV5, 470). However, it is clear that when Keating put Skipper on the

stand, he was unaware of Skipper's ***entire*** testimony because they "were very tight-lipped" about the investigation. (PV5, 606-607).

Despite Keating's acknowledgement that Skipper and law enforcement determined that that there was no connection whatsoever between Paulk's murder and the serial killings, he believed that Skipper's testimony did not hurt his case. Keating reasoned as follows:

> "when you – you call a witness, especially a witness like this ***who would not necessarily be favorable to my case***, every witness has a positive and a negative. So what I was trying to get into evidence was that there was a serial killer out in the community, that the victims were prostitutes and that the victims were killed and their bodies were found out by the woods. . . . ***When you put on a witness who is not a favorable witness, you take hits sometimes.***"

(PV5, 609-611). Keating also stated that Skipper was "an unfavorable witness" and did not want to testify, yet Keating believed the defense was "viable." (PV5, 611).

At the evidentiary hearing, forensic criminologist expert Brent Turvey, M.S. Forensic Scientist ("Turvey") testified in support of claim 6. (PV4, 393-510). Turvey gave a detailed testimony of his extensive education, experience, and background as a forensic scientist and criminal profiler. (PV4, 393-439). Turvey testified in a number of cases as listed in his *curriculum vitae* [Defense Exhibit 20]. (PV4, 425-426). He has been qualified and was accepted in this case as an expert in the areas of forensic science, crime reconstruction, linkage analysis, and victomology. (PV4, 428-450). Turvey has been an asset to law enforcement

agencies in serial homicide and rape cases. (PV4, 403-406 & 408-409).

Turvey testified that "linkage analysis is essentially examining cases to determine whether or not they are linked in some fashion" where "[y]ou've got two cases or three cases or more and you don't know if they're committed possibly by the same person" and his "job in both instances is essentially the same, to help law enforcement or attorneys understand whether or not there is sufficient behavioral evidence to ***say these cases have been committed by the same offender.***" (PV4, 402-403 & 432). Turvey in determining his opinion looked at materials from the Daytona Beach Police Department, the medical examiner, the C.A. Pound Human Identification Laboratory, FDLE and the trial materials. (PV4, 452-454). He also reviewed the articles [Defense Exhibit 22] that came from Keating's trial boxes regarding the serial killings. (PV4, 454 & PV5, 612-617). Keating relied on these articles and the five minute phone call for his defense. (PV5, 612-617). Turvey testified that he did not need to speak to Skipper because it "would not be appropriate" and he would not need to analyze the physical evidence or speak to the investigators for his analysis. (PV4, 507-509).

Turvey's first finding based on his review of Jackson's case was as follows:

> "[T]he very first issue of reliability and sufficiency, . . . ***there is insufficient information to – for comparing this case to a known or serial pattern case, if you're trying to make a - - confirm a connection.***"

(PV4, 477). He cautioned against relying solely on newspaper articles but agreed

that the articles are a legitimate stepping stone once there is corroboration as to whether Paulk's murder was linked to the killings. (PV4, 460-461 & 473). Since Keating relied on the articles, the following question was posed to Turvey:

> "Q. If all you had was the newspaper articles, would you have advised trial counsel to do the serial killer defense in this case."

(PV4, 473), to which he answered as follows:

> "A. Oh, absolutely not. Again the newspapers raise the question, but they don't answer it."

(PV4, 473). With regard to Skipper's testimony, Turvey made the following pertinent findings:

> "A ***Well, he was specifically asked, you know, what were the similarities, I think, and then – and then he was asked whether or not he considered this was linked to it, so I think he was asked that question. . . And he answered no***. So, obviously, in his mind case linkage was something that, one, the task force was doing; and two, he had not done -- ***he had not linked this case to that series***. . . .
> A Well, they're -- victimologically speaking, they are not dissimilar. They are -- Pallis Paulk was engaged in what someone referred to as prostitution, she was involved in drugs. The other victims were prostitutes and they were drug addicts. That's not a question. They all happened in the State of Florida in the same general geographic region, but that's sort of where it breaks down. ***The differences become very apparent very quickly***, and that is – . . .
> A In my opinion, yes, ***there's not a lot of -- great deal of relevant similarity beyond that***. . .
> ***The differences are very strong and very -- very obvious. And one is, in the case of Pallis Paulk, while we have no method of killing, we have no evidence of a gunshot wound, that I'm aware of, and all the victims in the serial murder case, they were all shot.***
> ***And in the case of Pallis Paulk, we have no evidence of a sexual component, whereas in the other cases you have three that are under consideration, according to Captain Skipper's testimony,***

those all had a heavy sexual component.
So right there, ***the two threshold elements, the method of killing and the motivation, we don't have an ability to compare them. We don't have a similarity there that's evident. . .***
A Well, according to Captain Skipper, the victims were -- and it was not clear from his testimony, it had to be covered a couple of ways, but one of the victim's he said was found nude, and it was clear that the other victims were either found nude or partially nude. And since I have not reviewed those cases, I can only rely on his testimony. I'm not sure what it was, but I know that's part of the sexual aspect. ***In the case of Pallis Paulk, that's not true. So that's another difference, another disparity***, if you will.
Q ***Do you recall Captain Skipper's testimony regarding whether or not Pallis Paulk's death was similar to the deaths in the serial killings in Daytona Beach***?
A ***In his -- his opinion, they weren't.*** . . .
A Well, ***I have to agree with Captain Skipper and say that based on what I've looked at, they're not.*** What I'm -- what I'm basing that on is information that's just in the record. I haven't reviewed the full case file on those three cases. ***So what I can say is, just on a threshold level with the threshold information that we have, they're very dissimilar.***"

(PV4, 463-470). Turvey, if retained, would not have advised counsel to use the serial killer defense. (PV4, 473). He agreed that Skipper's findings made sense to him and he "can only agree with his findings because the ***discrepancies and the disparities he mentioned are so significant.***" (PV4, 474). Skipper's testimony supports his opinion that the defense was inappropriate. (PV4, 474).

Claim 11 argued that counsel failed to effectively investigate Paulk's background as an informant for the Metropolitan Bureau of Investigation ("MBI"). William Dean Hinton ("Hinton") testified in support of this claim. (PV2, 181-232). Hinton is a member of the Tennessee Bar and is employed with the U.S.

Attorney's Office in the Middle District of Tennessee. (PV2, 182). Prior to that, Hinton was employed as a staff writer at the Orlando Weekly from January, 2000. (PV2, 183). As a staff writer, he would conduct interviews of witnesses and perform public records requests. (PV2, 183-184). In addition to print form, the Orlando Weekly is available on the internet, orlandoweekly.com. (PV2, 184-185).

Hinton wrote a couple of articles specifically about MBI. (PV2, 185). Hinton testified that MBI "was a collection of a number of agencies, policing agencies, including federal agencies, for example, the Orlando Police Department was involved, Orange County, Osceola, the DEA, Immigration, [I think] the FBI. So they all came together in one umbrella organization, and they - - their mission was to stamp out organized prostitution rings and organized drug rings." (PV2, 186). Hinton obtained his information from interviews, public records requests, and depositions. (PV2, 186). He also spoke to William Lutz, the second in command, MBI. (PV2, 206 & 219-220).

Hinton authenticated a number of articles that he wrote for the Orlando Weekly regarding MBI. He authenticated an article titled "Morality Police" published on August 7, 2003, [Defense Exhibit 2]. (PV2, 52-56). This article was available in the public domain by an Internet search. (PV2, 211-219). This article talked about MBI's efforts to close an Orlando adult entertainment club called Cleo's, and mentioned ***Pallis Mae Paulk's name*** on page 3 "as an exotic dancer

who, allegedly, sold cocaine to a couple of undercover agents of the MBI, . . . and then she turned state's evidence." (PV2, 192-193). Hinton testified that Paulk "became a confidential informant for the MBI. . . based on her information that she gave to MBI, the MBI moved to close Cleo's, made an attempt to close Cleo's. And she had given contradictory statements, and so in the course of trying to determine which statements she might stand behind, she disappeared." (PV2, 194). On pages 2 and 3 a person by the name of Joseph Cocchiarella ("Cocchiarella") is mentioned. Cocchiarella testified, the hearing as the custodian of the MBI records. (PV2, 194). Hinton testified that Cocchiarella was the legal adviser and a "figurehead for the MBI." (PV2, 195).

Hinton testified about other articles that he wrote about the risky activities that MBI was involved in. He authenticated an article titled "Cops in Cocoa Stamp Out Sin" published on August 1, 2002, and an article titled "Dirty Politics" published on October 3, 2002, [Defense Exhibits 3 & 4]. (PV2, 197-198). His co-worker, Jeffrey Billman, authored an article about MBI and Cleo's titled "Operation Overexposed" published on September 25, 2005, [Defense Exhibit 5]. (PV2, 204). Hinton could have been found through his colleagues at the Orlando Weekly and he would have made himself available to counsel. (PV2, 204-205).

Cocchiarella was the next witness presented in support of claim 11. He is an assistant state attorney with the Ninth Judicial Circuit and is assigned to the MBI

as general counsel. (PV2, 233-234). He has been with the MBI since 1986. (PV2, 235). He testified that he is also the records custodian who prepared the records in response to Jackson's post-conviction public records requests. (PV2, 238-241). Cocchiarella introduced into evidence numerous documents that referenced Paulk and that were retained as business and/or public records by the MBI [Defense Exhibits 6-13]. (PV2, 243-265).

Cocchiarella testified that the investigation would have concluded when the arrest warrant was obtained in December of 2002, and later stated that the consent order would be the best timing for when the investigation concluded which was entered on January 2003. (PV2, 250 & 253). He testified that Paulk agreed to become a cooperating witness. (PV2, 251 & 264). He also testified that her charges were later dismissed on June 25, 2002. (PV2, 257).

Keating testified that he was provided by Jackson's collateral counsel all of the above referenced newspaper articles and the MBI records. (PV5, 621& 626-628). He testified that in preparation for trial, he was not aware of the Orlando Weekly articles. (PV5, 622). His investigator was tasked to look up Paulk's background but these articles were not revealed. (PV5, 622-623). Keating agreed that Paulk's risky lifestyle was a major theme in his case. (PV5, 623).

Keating testified that after reviewing the articles, he discovered Paulk's name in the article. (PV5, 623). He testified that based on the articles, he learned

that Paulk was involved with a club named Cleo's where she was a dancer or a stripper and that MBI was investigating drugs, stripping and prostitution. (PV5, 623). He also learned that Paulk was "trying to trade off on charges or roll over in some way in exchange for charges." (PV5, 625). He testified that this information "would have expanded the potential third party possible suspects who had a motive or opportunity to want to hurt or harm Pallis Paulk." (PV5, 626). He testified that it would have strengthened his presentation because "this stuff just seemed more specific and that probably would have assisted at trial." (PV5, 626). He also stated that he "may have very well have done more research or [he] may very well have used those articles to point 60 miles away and say, 'There's some possible suspects over there in Orlando.'" (PV5, 626).

Keating testified that he knows how to conduct public records requests and requests to the clerk's office. (PV5, 627-630). He testified that based on his review of the MBI records, his trial strategy is affected because "[i]t puts some specifics on [his] general allegations" and thus "perhaps is more credible because it's more specific." (PV5, 629-630). He later also testified that "if [he] had known about these articles, [he] may have tried to introduce the articles themselves under self-authentication under the evidence code and without calling live witnesses." (PV5, 694). He testified that he "could have made hay out of this stuff" and he "could have said 'Look, look, all the people that she's got that are mad, her in Orlando.

Maybe one of them did it.'" (PV5, 696-697). Keating had planted the seed but the MBI information would have given him more specifics. (PV5, 696-697). Keating recognized that the MBI information gave him an opportunity to argue that "all these other people who had an opportunity to do something bad to her. Opportunity and motive." (PV5, 697). He also resolved the delay in the time period between the Cleo's case being closed and Paulk's disappearance by stating that "retaliation is usually done quicker. Although, [he has] heard the statement that revenge is better served cold." (PV5, 697). Keating stated that if he had the information available he could have used it to expand the geographic area of potential perpetrators who had opportunity and motive and it would have been more specific than his general statements that Paulk had a risky lifestyle. (PV5, 724).

Claim 17 argued that counsel's presentation during the penalty phase fell below acceptable professional standards because counsel failed to specifically investigate and present mitigating evidence of Jackson's ***prevalent substance abuse history***. Dr. Daniel Buffington, PharmD. ("Buffington"), Jameel McLaury ("McLaury"), and Tonya Jackson ("Mrs. Jackson") all testified as to this claim. Buffington specifically looked for evidence of substance abuse. (PV4, 561). The State presented expert witness, Dr. Jeffrey Danziger ("Danziger").

Buffington was qualified and accepted as an expert in pharmacology and toxicology. (PV4, 378-397 & PV15, 2231-2282). Buffington went through the

same materials that were provided to Danziger at trial [except for the materials from Olney McClarty that Danziger did not have]. (PV4, 533-537 & PV14, 2173-2216). Buffington interviewed McLaury, Mrs. Jackson, and Jackson's mother. (PV4, 536). Buffington found that Jackson's medical records, DOC records, other experts' reviews and assessments, and the statements from family and friends, well-supported Jackson's substance abuse history from childhood to adult. (PV4, 536, PV13, 1943-1993 & 2010-2013 & PV14, 2173-2216).

Buffington gave a chronological history of substance abuse in Jackson's life starting from pre-natal exposure. Buffington found that Jackson was exposed to cocaine, PCP, and hallucinogens pre-natal. (PV4, 537-538). This exposure can have long-term psychiatric complications on the child and developmental challenges ranging from neurological complications to emotional disorders. (PV4, 537-538). Buffington looked at Jackson's genealogy where he had multiple family members who had substance abuse problems and he opined there was a potential for a genetic predisposition. (PV4, 539). Buffington obtained this information from interviews and from Danziger's report and deposition that were available to counsel. (PV4, 539 & PV13, 1943-1993 & 2010-2013).

Buffington testified about Jackson's "extremely unusual early exposure to substances" as early as ages 6 and 7 to alcohol and marijuana. (PV4, 540). This information was in Danziger's findings and reported to counsel. (PV4, 541, PV6,

792-795 & PV13, 1943-1993 & 2010-2013). Buffington testified about Jackson's self-medication using illicit substances to get away from his abusive lifestyle in terms of abandonment from his mother and the physical abuse he suffered while in foster care. (PV4, 542-544). Jackson was self-medicating at such a young age, as indicated in the records and in Danziger's findings, to avoid emotional traumas related to grief of a sibling's death, abandonment by his mother, physical trauma and abuse. (PV4, 556-557).

Buffington testified about the significant effect of the psychiatric medications that Jackson was exposed to at Wuesthoff Mental Hospital and at Northeast Florida State Hospital at a very young age. (PV4, 550-552). Jackson eventually stopped taking these psychiatric medications that had side-effects such as anxiety, paranoia, and hallucinations around 15 or 16. (PV4, 550-552 & 560). Jackson described "how scary it was to be on those and how - - how bad it made him feel." (PV4, 550-552). Buffington opined that "when an individual is afraid to take or resistant to taking the medications that are prescribed to them in the therapeutic realm, illicit substances become their personal substitute." (PV4, 552-553). It was apparent to Buffington that Jackson was self-medicating when he looked at the patterns, tolerance, and progression of illicit substance abuse. (PV4, 553). He opined that Jackson self-medicated with alcohol, primarily cognac or Hennessey, and marijuana. (PV4, 554). This was corroborated by witnesses. (PV4,

554). Also, Danziger found that Jackson abused marijuana every day in large quantities and consumed Hennessey [cognac]. (PV4, 554 & PV6, 806-807).

At age 18 or 19, Jackson was exposed to cocaine but his predominant drugs of choice were marijuana and alcohol. (PV4, 560-561). Buffington testified that marijuana "is an impairing drug." (PV4, 561). He testified similarly to Danziger about the effects of marijuana as follows:

> "It is an agent that has psychopharmalogic properties, so it does have a capacity to alter an individual's perception, cause a sense of euphoria. From a cognitive perspective, it's a dulling or blunting type of substance in individuals. At no point is marijuana use associated with enhancing an individual's performance or thought process."

(PV4, 561-562 & PV6, 812-813). Buffington disagreed that marijuana is a "soft" drug. (PV4, 562-563). He testified that marijuana is absolutely addictive as is alcohol. (PV4, 563). Jackson primarily consumed cognac and Hennessey from teen years to the point that he would suffer blackouts, meaning he would drink to such an excess and not pass out *per se*. (PV4, 563-564). Together, alcohol and marijuana had a compounding effect since they are depressants. (PV4, 564).

Buffington found evidence in the DOC records of an incident report where Jackson continued to risk consuming marijuana while incarcerated. (PV4, 566 & PV14, 2176-2178). This indicated "a drive or level of addiction that an individual is willing to, even under a period of incarceration, seek out, drug seeking and an acquisition behavior which would, obviously, put them, greater risk of penalty

while there." (PV4, 566-567). Danziger also highlighted this concern because Jackson would continue to abuse drugs while on probation "despite the risk." (PV6, 810). The records contained a psychological assessment by Olney McClarty from 2000, where there was evidence of "duration of substance abuse problems that he struggled with" and the report defines the diagnosis of cannabis dependence and abuse as a diagnosis. (PV4, 571 & PV14, 2173-2175). Mrs. Jackson described the escalation of Jackson's substance abuse to the point that she did not recognize him. (PV4, 570). Buffington was able to explore Jackson's Ecstasy use which began about 2003 or 2004. (PV4, 571-572).

Buffington found in Jackson's post-sentencing investigation community control report [Defense Exhibit 17] evidence that Jackson had "multiple legal complications related to substance abuse use and/or handling of controlled substance." (PV4, 569). He testified that the fact that Jackson had sale of controlled substances charges does not negate his substance abuse because "it's consistent with the use or products that he was - - agents that he was using and activity in at-risk behavior surrounding those, which is a factor in the description of substance abuse and dependence." (PV4, 569-570). It should be noted that Keating had in his possession a letter from Jackson to the drug court begging for help with his substance abuse problem. (PV5, 651-654 & PV15, 2297-2300).

Buffington testified that he did not disagree with Danziger's findings that

Jackson was Bi-Polar. (PV4, 574). Buffington testified that this diagnosis is significant in his expertise because "it is significant and typical bipolar patients do reach out and have a high propensity for substance abuse. It is very common." (PV4, 575). Using the DSM-IV, Buffington reviewed the criteria for substance abuse and found that it supported his position that Jackson had a continuous but progressive use and abuse of different substances. (PV4, 574-578). Danziger testified that his Axis I diagnosis was cannabis dependence and that he had suspicion of alcohol abuse but he had not been asked to do any follow-up on this suspicion. (PV6, 825-826). The complete drug history investigation demonstrated that substance abuse consumed Jackson's life. (PV4, 578).

McLaury and Mrs. Jackson testified about the substance abuse that they witnessed. (PV5, 732-744 & PV6, 764-776). McLaury testified that his cousin is married to Jackson's aunt. (PV5, 732). He testified that he first met Jackson when he was 13 or 14 years old, and that they lived next door to each other. (PV5, 733-734). During the early years, from 1998 to 2000, McLaury saw Jackson smoke marijuana more or less on a daily basis. (PV5, 734). He did not think there was a time that he did not see Jackson smoking marijuana. (PV5, 734). He also saw Jackson consume alcohol. (PV5, 734-735). Then, in 2000, McLaury lost contact with Jackson because he was incarcerated. (PV5, 734).

McLaury testified that sometime in 2003, they got rather close and they

would see each other more or less on a daily basis. (PV5, 735). He saw Jackson smoke marijuana on a daily basis and saw him drink all the time in the local park and he would see Jackson smoke a quarter ounce to a half ounce every day and consume about half a gallon of alcohol every couple of days, specifically Hennessey and Heineken. (PV5, 735). They started a business together sometime from 2004 to 2005 and McLaury would see Jackson smoke marijuana daily during work hours. (PV5, 600, 736-737 & 738-739). McLaury also saw Jackson take Ecstasy, which escalated from one or two pills to four or five pills at a time. (PV5, 734 & 737). McLaury was present during the purchases of the pills and he saw Jackson take a combination of marijuana, alcohol and Ecstasy on more than one occasion. (PV5, 737). McLaury did not recall being contacted by counsel or Danziger regarding Jackson's substance abuse history. (PV5, 737-738).

Mrs. Jackson is employed at Bert Fish Medical Center as a unit clerk. (PV6, 765). She met Jackson at the workplace in 1997 or 1998, and during their romantic relationship, she learned from Jackson about his drug use. (PV6, 765-766). She learned that drugs were important to Jackson because it would calm his nerves. (PV6, 766-767). She saw Jackson consume marijuana and Hennessey. (PV6, 767). It should be noted that Keating testified that he was not sure if he interviewed Mrs. Jackson about her husband's marijuana use. (PV5, 635). They got married on August 5, 2001, at Baker County Correctional Institution. (PV6, 767-768). Mrs.

Jackson noticed that while in custody, Jackson was more agitated because he was not engaging in drug use. (PV6, 768). Upon his release, Jackson resumed his drug abuse. (PV6, 769). He would consume alcohol and marijuana every day. (PV6, 769). Mrs. Jackson also saw Jackson consume Ecstasy. (PV6, 769). She testified that the Ecstasy would make Jackson black out, where he would not remember what he said or what he did or where he would put things. (PV6, 770).

In October of 2004, Jackson and his wife separated. (PV6, 770). Mrs. Jackson would see him every other day. (PV6, 770). She continued to observe Jackson using alcohol, marijuana and Ecstasy. (PV6, 770). Mrs. Jackson noticed that Jackson was taking more. (PV6, 770-771). Mrs. Jackson testified that her husband went into the Stewart-Marchman Rehab Center that helped him. (PV6, 771). However, a few months after he got out, he resumed using drugs and alcohol. (PV6, 771). Mrs. Jackson recalled speaking to counsel and discussing drug use with them. (PV6, 772).

Keating testified that he was the in charge of both trial phases but "[t]he rest of Phase II, [he did not] really have a recollection of [his] involvement." (PV5, 631). He testified that in terms of questioning witnesses Bonamo "was in charge of Phase II." (PV5, 631 & 651). Bonamo wrote the sentencing memorandum. (PV3, 330-333 & PV5, 632-633). Keating believed that he gave Bonamo a list of mitigators and that since it was Bonamo's first time that they would have gone

through the statute on aggravators and mitigators and he would have provided him with a primer package. (PV5, 633-634). Keating agreed that he never argued to the jury that they could consider substance abuse history as mitigating evidence or later at the *Spencer* hearing. (PV5, 640).

Keating admitted he knew Jackson smoked a lot of pot daily. (PV5, 634-635). He spoke to Jackson's mother about her drug problem and not regarding Jackson so much. (PV5, 635). Keating's memo [State's Exhibit 1] shows that he wrote that Jackson smoked pot daily, all day, that Jackson drank Hennessey liquor, that Jackson sold drugs; yet Keating indicated that Jackson denied drug use. (PV12, 1843-1849). Keating did not think an expert was required for marijuana use. (PV5, 636).

Jackson's death penalty case was Bonamo's first. (PV3, 276). Bonamo was retained after Keating was appointed. (PV3, 284). Bonamo's role was primarily focused on the potential for any penalty phase issues. (PV3, 277). Bonamo did not indicate familiarity with the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, 2003, edition. (PV3, 278-279). He agreed that generally addiction and history of substance abuse can be considered as valid non-statutory mitigator. (PV3, 282-283). He testified that he has seen drugs such as cannabis, cocaine, heroin and Ecstasy being abused. (PV3, 283). He testified that by the time he became involved that Danziger had already

been spoken to by Keating. (PV3, 285). Since Bonamo was in charge of the penalty phase, he obtained the records given to Danziger[1]. (PV3, 291).

Danziger supported Jackson's prevalent substance abuse history as follows:

"A. That would refer to page 46 of the ***mother's deposition***.
Q. Okay. And what does this say here (indicating)?
A. That was the mother saying during the pregnancy she was sick all the time, ***smoked marijuana, and, one time the marijuana had PCP, or phencyclidine, in it***.
Q. And did you, in fact, testify to that, trial?
A. I did. As I recall, I testified, among other potential mitigating factors, that Ray Jackson ***may have been exposed to substances in utero***, in the womb.
Q. And the note on top of page 3 --
A. Yes. Would you like me to read it?
Q. Yes, please.
A. . . . 'Issues, mother, ***prenatal drug exposure***, doubt much prenatal care, voodoo ritual. Born ' – referring to Jackson –' with jaundice in an incubator. Witnessed domestic violence, age 1 to 7, by

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[1] 1) Psychosocial Assessment done in March of 2002 by Olney McClarty showing the Axis I diagnosis of cannabis dependence and alcohol abuse [Defense Exhibit 14]. (PCV3, 291-293).
2) A DOC Incident report dated August 3, 2002 regarding introduction of Cannabis into Baker Correctional Institution [Defense Exhibit 15]. (PCV3, 302-303).
3) A DOC Incident report dated August 3, 2002 regarding introduction of Cannabis into Baker Correctional Institution [Defense Exhibit 16]. (PCV3, 302-303).
4) A post-sentence investigation community control report showing that Jackson has a criminal history involving controlled substances, that he was enrolled in the in-patient Stewart-March drug treatment program, and that he consumed hard drugs [Defense Exhibit 17]. (PCV3, 30-307).
5) Danziger's hand-written notes that Bonamo discussed with Danziger, but Bonamo could not testify to the abbreviations [e.g., ETOH and MJ] or read the handwriting [Defense Exhibit 18]. (PCV3, 308-324).

stepfather, Reynard Thayer, also locked out of house, beaten by stepfather. Death of infant sister. Depression began age 6. Suicide attempt age 8, to Wuesthoff Hospital, then Macclenny, then foster homes and Rivendell Hospital. Issue of abandonment by mother, ***drugs***, homelessness, mental illness on the part of the mother.' And then there's a plus FH, which is positive family history, 'Biological father in prison. Mother, history, bipolar disorder, ***crack cocaine use***, HIV-positive, other relatives with a psychiatric history.'"

(PV6, 792-794 & PV13, 1943-1993 & 2010-2013).

"Q. And I'm on page 4 now. And is that your synopsis of ***the Department of Correction records***?

A. Yes. There's a little 'DOC' up there, and it is, indeed, a summary of the DOC records.

Q. And did you make a note here of a '***polysub abuse, paren, ETOH, MJ***'

A. Right. What that is -- and, again, that's my own shorthand and abbreviations. What I'm listing there are the diagnoses given by staff, the Department of Corrections. And on ***August 9, 1995***, one of the staff members there diagnosed, on ***Axis I, impulse control disorder and polysubstance abuse. ETOH is alcohol, MJ is marijuana***, and then Axis II, ASP, or antisocial personality. So that was the diagnosis given by one of the mental health staff in the department on August 9, 1995."

(PV6, 795-796 & PV13, 1943-1993 & 2010-2013).

"Q. So back to what the notes of the September '94 analysis would show.

A. Continuing on -- and, again, I'm paraphrasing the original document, which I have it here, ***it showed that there was a positive history for alcohol and marijuana in the past***, treatment with Mellaril, CPZ, or chlorpromazine, is Thorazine, and Haldol, all of those are older antipsychotic agents."

(PV6, 797-798 & PV13, 1943-1993 & 2010-2013).

"Q. And, some point did you note the drugs that Jackson related to you that he was taking?

A. Yes. What I did during my May 14, 2006, interview is attempted to do an extensive substance abuse history on Jackson. Obviously, when I met with Jackson, he was, the Volusia Jail, so, the

time, he was, presumably, sober and did not have access to drugs starting, the time of his arrest.

Q. And on page 10 of your notes, does it outline the notes of your interview with him?

A. Yes.

Q. And what did Jackson relate to you about his ingestions?

A. Okay. And I'm -- I have my original notes here, which this is a copy of Jackson -- I started asking about his drug use. I began with ETOH, or alcohol. Obviously, no drugs in jail. He said he'd been locked up for about a year. Before being locked up, he was a cigarette smoker. He was smoking about one pack a day.

With regard to alcohol, he said that he drank. He said that when he drank, he drank. There was some question of a high tolerance. He said he would drink ***Hennessy***, he might -- which is a cognac. He would drink one night and then maybe nothing for two to three weeks. He denied daily drinking or morning drinking. He denied alcohol withdrawal symptoms. ***I put plus-minus possible tolerance.***. . .

A. That I put plus-minus tolerance, meaning ***he indicated that he could drink quite a bit.*** So when people drink on a heavy and regular basis, they may find they can handle more alcohol than others can, or ***it may take more alcohol for them to feel its effects. So after talking with him, I put there was some question as to whether he had developed some tolerance to alcohol.***

Q. And then the next –

A. The next line, I put "AA," which is Alcoholics Anonymous, and he said ***he'd been, the Stewart-Marchman Center, but that was for drugs and not for alcohol.***

Q. And do you recall obtaining the records, Olney McLarty, and there was a psychological evaluation back in 2000 where he was admitted to Stewart-Marchman in 2000?

A. ***I didn't have those records.***[2]

Q. Okay. But he told you that he had gone there for drugs?

A. He did. . .

Q. Now we're in the middle of that page. What else did Jackson tell you about drugs?

A. What I did there was went through different drugs, essentially,

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[2] Keating recalled that he had the psychological assessment by Olney McClarty showing an Axis I diagnosis of cannabis dependence and alcohol abuse diagnosis. (PCV5, 638-639).

in an organized fashion. ***I began with marijuana. He said he used it on a daily basis all day. He said he smoked on probation despite the risk. He said he was, the Stewart-Marchman Center for marijuana. He said that he first used marijuana, the age of six, a cousin had him steal some from his mother's purse, and he was a regular user of marijuana by the age of 13.***

Q. So when you said the AA, Stewart-Marchman comes later, that -- Jackson told you that because he was using marijuana, he went to Stewart-Marchman?

A. That is what he told me.

Q. Okay. Now, as far as the next plus --

A. Yes, the plus means he answered yes, and I put "XTC," ***which is Ecstasy. He said it was not a big thing, occasional use if he was with friends or with the ladies, he did not use it on a daily basis.***

. . .

A. He also denied the abuse of any stimulants ***other than Ecstasy***, which is in the stimulant class, but he denied abusing Ritalin, Dexedrine, things in that class. He then told me that he actually sold Lortab, Percocet, Oxycontin, Xanax bars, cocaine, crack, and meth, but said that he didn't use them. He said just marijuana and occasional Ecstasy, occasional alcohol. The alcohol was not heavy. So I did spend a significant amount of time ***trying to obtain a good drug abuse history, and that was the information that I obtained from Jackson.***"

(PV6, 805-814). Bonamo prepped and discussed with Danziger's deposition testimony and was present at the deposition. (PV3, 152-153). Danziger discussed his diagnosis of cannabis dependence with counsel. (PV6, 816-817).

Danziger explained that "Axis I refers to major psychiatric syndromes, and these would be things such as bipolar disorder, schizophrenia, major depressive disorder, ***alcohol dependence***, and so forth, major mental health and ***substance abuse diagnoses.***" (PV6, 815 & PV13, 1943-1993 & 2010-2013). Danziger testified about his drug and alcohol abuse diagnosis as follows:

"A. Yes. What I said was ***I said he had cannabis dependence***, which was in remission in the controlled environment of the jail. In other words, in the jail, he's not smoking weed, he is in an enforced state of remission. ***But I did diagnose him with cannabis dependence, and I also noted the possible abuse of alcohol.***
I suspected that he might have been minimizing his alcohol use, but at face value, I could not make an alcohol abuse diagnosis.
Q. And what is cannabis dependence?
A Well, cannabis, of course, is the – is another name for marijuana. And ***dependence, again I'm using the diagnosis -- diagnostic criteria in the DSM-IV*** To make a diagnosis of substance abuse -- I'm sorry -- substance dependence for any substance – ***there are seven factors listed -- someone must have three of them. The first is tolerance to the effect of the substance, meaning you either have to use more of it to get the same effect or prevent withdrawal; the second is some characteristic withdrawal symptoms when you stop taking it; the third is you take the substance in larger amounts or over a larger period of time than intended; the fourth is persistent desire or repeated unsuccessful attempt to quit; the fifth is you spend a great deal of time obtaining it, using, or recovering it; the sixth is you give up important occupational, social, or recreational activities; and the seventh is you're using it despite knowledge of adverse consequences.***

So what would I say applied to Jackson? ***There was likely some tolerance to the marijuana. He was smoking a tremendous amount of it, by his account. Was he taking it in a larger amount or a longer period of time than intended? Essentially, he was just using it all day long, several times a day. He was spending a great deal of time using it, essentially, staying intoxicated on marijuana all day long. And he reported that he was using it even on probation, given the known risk of a drug screen that would violate his probation.*** So I opined that, with regard to marijuana, ***he met the criteria in our diagnostic manual for substance dependence.***"

(PV6,816-817). Danziger testified that "[i]t ***is rare and uncommon for people to become aggressive, angry, hostile on cannabis, and, actually, the converse***" and that "generally, it produces sort of a peaceful, euphoric, pleasant high, reduces

anxiety, not generally associated with anger, hostility, or aggression." (PV6,814). Bonamo knew this all of this as he was at Danziger's deposition. (PV6,686-687).

Counsel did not develop alcohol as a mitigator despite their knowledge. (PV5,640-641). Danziger testified that his discussion with counsel regarding cannabis dependence was focused on the time of the crime. (PV6, 818-820). Danziger testified as follows:

> "My thinking was - -, the time, was that it played very little role in what took place in November of 2004, that while Jackson did admit ***to the heavy use of marijuana***, I could not see any connection between cannabis usage or any substance usage with the - - with ***what reportedly took place on November 9, 2004.*** I could not see any connection.
> I could certainly - - ***if they wanted to ask me, and, indeed at the deposition I was asked, I could say, yes, I think there's a history of cannabis dependence.*** The problem was, as I saw it, that I could not tie alcohol use, cannabis use, any substance use to his behavior, the time. . . .
> The other problem is that when you look, marijuana, ***marijuana's generally not associated with violence. People on marijuana tend to be peaceful, lethargic, sleepy, happy.*** . . .
> ***So the issue was, if they [the defense attorneys] wanted to ask me about it, I certainly could say yes, cannabis dependence, which indeed, I did testify in my deposition***, but if asked could I in any way tie it to the behavior that the jury found to have to have taken place, I could not make the connection."

(PV6, 818-820). Danziger advised counsel of the diagnosis of cannabis dependence in remission in the controlled environment of the jail. (PV6, 825). Even though Danziger could not make an alcohol abuse diagnosis, he suspected that that Jackson was minimizing his alcohol abuse based on his lengthy

experience. (PV6, 825-826). He opined that he "was thinking that maybe there's more alcohol use than he's acknowledging." (PV6, 825). Counsel contradicted Danziger's testimony that was consistent with his trial deposition, by stating that "both he [Danziger] and I agreed that marijuana use in Ray's case would not be an effective mitigator." (PV5, 647). Yet, Danziger confirmed that "there's a history of cannabis dependence" in Jackson. (PV6, 818-820).

Danziger testified regarding Jackson's heavy use of cannabis that "if they [the defense attorneys] wanted to ask me about it, I certainly could say yes, cannabis dependence, which indeed, I did testify in my deposition." Keating testified that he thought it carried little weight and was a misdemeanor and he did not think it would help Jackson that he smoked pot. (PV5, 638). Danziger did not interview any of Jackson's family members, business partners or friends. (PV6, 826-827). Danziger did not even speak to Jackson's wife, but he admitted that "[s]ometimes speaking to family members can be helpful in corroborating information" for a diagnosis. (PV6, 826-827). He agreed that in interviewing family members or friends, he could have obtained corroborating evidence to support his suspicion that Jackson was minimizing his alcohol abuse. (PV6, 827-828). Danziger testified that he is ***not*** excluding cannabis dependency or substance abuse history as a mitigator. (PV6, 829-830). Despite, Danziger's prevalent substance abuse findings known to counsel, counsel unreasonable testified that the

only information he had was that Jackson smoked pot. (PV5,640-641).

SUMMARY OF ARGUMENTS

ARGUMENT I: The court erroneously denied claims 1, 6, 11, and 17, raised in Jackson's Motion to Vacate. Counsel failed to provide effective assistance of counsel in accordance with *Strickland v. Washington*, 466 So.2d 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). Claim 1 argued that counsel's failure to properly investigate and present the testimony of Paulk's brother to contradict that the victim was last seen alive on November 9, 2004, undermined the outcome in the case. Claim 6 argued that counsel failed to competently investigate his serial killer defense prior to putting on Captain Brian Skipper, who eliminated the serial killer defense. Claim 11 argued that counsel failed to competently investigate Paulk's background that would have shown that she was a cooperating witness for law enforcement which could provide a motive for other named individuals to kill her. Claim 17 argued that counsel's penalty phase presentation fell below acceptable professional standards because counsel failed to investigate and present available weighty mitigating evidence of Jackson's prevalent substance abuse history. The court's denials should be reversed and Jackson should be granted a new trial.

ARGUMENT II: The court erroneously denied legal claims 14, 15, 16, and 20 raised in Jackson's Motion to Vacate. Counsel's conduct was deficient and unreasonable in violation of *Strickland*, 466 So.2d 668. Claim 14 argued that

counsel was ineffective for failing to object to numerous improper prosecutorial closing remarks. Claim 15 argued that counsel failed to conduct an effective, coherent and competent closing argument. Claims 16, 20, and 21 argued that the court failed to conduct a proper cumulative error analysis of the errors committed in the guilt phase, the penalty phase, and in both the guilt and penalty phase, which deprived Jackson of his due process. The court erred in denying these claims and Jackson should be granted a new trial. Claims 22 and 23 are also raised as constitutional legal issues that are not ripe but are preserved for further appeals

ARGUMENT III: The court erroneously denied Jackson a full and fair evidentiary hearing on claims 2, 5, 7, 12, and 18 raised in Jackson's Motion to Vacate. An evidentiary hearing should have been granted to establish that counsel's conduct was deficient and not sound trial tactic in accordance with *Strickland*, 466 So.2d 668. These claims were pled with sufficient specificity and were not conclusively refuted by the record. Claim 2 argued that counsel failed to effectively question the venire about what constitutes non-statutory mitigators and whether they would reject the valid mitigators. Claim 5 argued that counsel failed to object and move for a severance of Jackson's case when Wooten testified about evidence of other crimes, wrongs, or acts to show bad character or propensity, which would have been inadmissible against Jackson. Specifically Wooten testified that Jackson possessed a gun on another date other than the date of the

crime which portrayed Jackson as having a propensity to associate with or possess guns and to seek revenge or retribution. Claim 7 argued that counsel failed to conduct DNA analysis of the head hairs found, the gravesite to exclude Jackson as the assailant and to implicate the true assailant(s). Jackson maintains his innocence. This claim is related to Jackson's Motion for post-conviction DNA, in Argument IV. Counsel should have at least moved to exclude this evidence as it was not relevant and was prejudicial because it lent to the belief that the Negroid head hairs belonged to Jackson. Claim 12 argued that counsel failed to impeach prejudicial hearsay testimony by Hunt that Jackson's wife told him that Jackson threatened to kill him and to impeach V'shawn Miles with a transcription of her video-recorded interview or by playing back the recording. Mrs. Jackson's testimony and the DVD or transcription would have been introduced. Finally, Claim 18 argued that counsel failed to subject the state of its burden of proving the prison release reoffender ("PRR") status by allowing the court to take judicial notice of the date of release and the date of offense for the kidnapping by using certified and signed copies of the date of release from the Department of Corrections ("DOC"). The State did not present any witnesses to prove the PRR status. The court erred in denying an evidentiary hearing as to these claims.

ARGUMENT IV: Jackson has always maintained his innocence. The court erred in denying Jackson's Motion for post-conviction DNA analysis of the head hairs

from the gravesite. Jackson's motion was in accordance with Fla.R.Crim.P. 3.853. There is a credible concern that an injustice may have occurred and DNA testing may resolve the issue. As a matter of due process, Jackson was entitled to a DNA analysis of the hairs. *See Skinner v. Switzer*, 131 S.Ct. 1289, 179 L.Ed.2d 233 mclarty(2011). This case should be remanded to allow DNA testing of the hairs.

ARGUMENT AND CITATION OF AUTHORITY

ARGUMENT I

THE POST-CONVICTION COURT ERRED IN DENYING JACKSON'S MOTION TO VACATE JUDGMENT AND SENTENCE PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851 AFTER CONDUCTING AN EVIDENTIARY HEARING ON CLAIMS 1, 6, 10, AND 17

(A) Introduction

The United States Supreme Court has held that counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. *See Strickland*, 466 So.2d at 688. Specifically, counsel has a ***duty to investigate*** in order to make the adversarial testing process work in the particular case. *See id.* at 690. The *Strickland* two prong analysis to show ineffective assistance of counsel is as follows:

> First, a petitioner must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the 6th Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, whose result is unreliable.

Id. at 687. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Id.* at 688. To show prejudice "[t]he defendant must ~~show that~~ there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 693-694.

The "proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id*, at 688. Counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.* An attorney's performance is reviewed as follows:

> [j]udicial scrutiny of counsel's performance must be highly deferential and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effect of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective, the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Id. at 689. A reviewing court must consider the reasonableness of the investigation said to support that strategy." *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 2538 (2003). Whereby,

> [S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

> In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness.

Id. at 2535. In its assessment, the court "must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Id.* at 2538. In finding that counsel's investigation and presentation "fell short of the standards for capital defense work articulated by the American Bar Association guidelines to which we have long referred as 'guides to determining what is reasonable,'" the Court held that these guidelines set the standards for counsel in investigations. *Id.* at 2537 (internal citations omitted).

(B) Standard of Review

To uphold a court's decision on a *Strickland* claim pursuant to the Fla.R.Crim.P. 3.851, the following standard of review is laid out in *Sochor v. State*, 883 So.2d 766 (Fla. 2004):

> When we review a circuit court's resolution of a *Strickland* claim, as we do here, we apply a mixed standard of review because both the performance and the prejudice prongs of the *Strickland* test present mixed questions of law and fact.

Id. at 771-772 citing Strickland, 466 U.S. at 698 citing Stephens v. State, 748 So.2d 1028, 1033 (Fla. 1999); *see Schoenwetter v. State*, 46 So.3d 535, 546 (Fla. 2010) & *see State v. Larzelere*, 979 So.2d 195 (Fla.2008). Moreover, "(a)s long as the trial court's findings are supported by competent substantial evidence, 'this Court will

not "substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court."'" *Blanco v. State*, 702 So.2d 1250, 1252 (Fla. 1997) *quoting Demps v. State*, 462 So.2d 1074, 1075 (Fla. 1984) *quoting Goldfarb v. Robertson*, 82 So.2d 504, 506 (Fla. 1955).

(C) The post-conviction court erred in denying Claims 1, 6, 11, and 17.

Claim 1 argued that counsel was ineffective for failing to properly investigate and to present the victim's brother, Lewis's testimony, trial in violation of the *Strickland* standards. The court, whilst switching back and forth between some legal pads, orally denied these claims. (PV8, 1045-1046 & 1058-1060). The court erroneously found that based on the evidence of this circumstantial case it was "reasonable for Mr. Keating to rely on a private investigator that he had great confidence in." (PV16, 2505, 2512, & 2516).

The court's factual findings are not supported by competent and substantial evidence because there was no credible and contradictory evidence that Lewis had changed his statement placing his sister alive after November 9, 2004. *See Swafford v. State*, 828 So.2d 966, 977 (Fla. 2002). Lewis was in a unique position regarding when he last saw his sister because he is using his birthday as a reference. Lewis has stuck by his written statement and is certain of when he last saw his sister. (PV1, 18 & 27-29). Lewis testified in great detail consistent with his

written statement about his final encounter on Sunday, November 14, 2004, with his sister. (PV1, 27-28, 35 & 38-39). Lewis' details are remarkable and consistent with what he wrote under oath on April 17, 2005. It is clear that "the failure to call witnesses can constitute ineffective assistance of counsel if the witnesses ***may have been able to cast doubt on the defendant's guilt***." *See Devaney v. State*, 864 So.2d 85, 88 (Fla. 1st DCA 2003) *citing Marrow v. State,* 715 So.2d 1075, 1075 (Fla. 1st DCA 1998) *quoting Jackson v. State,* 711 So.2d 1371, 1372 (Fla. 4th DCA 1998)(emphasis added). Lewis certainly would have cast doubt based on his consistent testimony and his written statement. *See Sorgman v. State*, 649 So.2d 686, 687 (Fla. 1st DCA 1989). Counsel is "charged with marshalling any and all evidence that would have supported" Lewis' hypothesis of innocence. *Meus v. State*, 968 So. 2d 706, 713 (Fla. Dist. Ct. App. 2007) *reh'g denied and opinion modified*, 16 So. 3d 140 (Fla. Dist. Ct. App. 2009).

Regardless of whom Lewis spoke to during the trial proceedings, he was and is still certain that the last date he saw his sister was November 14, 2004. The important facts that have never changed are that the last time Lewis saw his sister was a week after his birthday in Bethune-Cookman Park with a black male with dreadlocks in a green Lumina. The State presented no credible evidence to contradict Lewis' written statement and testimony at the evidentiary hearing. Of note is that during the trial, witness Calvin Morris ("Morris") saw ***a black man***

with dreadlocks sitting in the courtroom later identified as Horace Verdell as the driver of the hatchback. (RV18, 328-337 & 339-340). Certainly, Morris' testimony would lend credence to Lewis' testimony about the black male with dreadlocks.

The State's action in not putting Lewis on the stand speaks volumes as it lends credibility to the fact that Lewis' statement was not beneficial to their theory of prosecution. Lewis' statement would have undermined the State's witnesses and would certainly create reasonable doubt. Moreover, the State put on Mr. Larry Paulk, the victim's uncle, despite the fact that he had made a mistake regarding when he had last seen his niece. (RV17, 128-139). This makes counsel's failure to call Lewis, a very credible witness, at trial to undermine the State's theory of prosecution, even more egregious and unreasonable. It is clear from the State's actions that Lewis was not a favorable witness. Certainly, if there was such a change, the State would have disclosed this material change in Lewis' statement. A disclosure was not necessary because Lewis' statement never changed. (PV1, 38).

Keating never personally spoke to Lewis in preparation for Jackson's case and that he simply relied on a memo from O'Malley, and O'Malley's assessment of Lewis' credibility. (PV5, 600-601 & 662-663). There is no testimony as to whether O'Malley spoke to the correct witness, if it was telephonic or in-person, or if the written statement was shown to Lewis. The record is devoid of any details regarding any purported interview. A credibility assessment cannot be made just

based on the hearsay memo. *See Johnson v. State*, 729 So.2d 970, 972 (Fla. 2d DCA 1999)(Unsworn narrative in billing statement is recognized as hearsay). Any testimony regarding what investigation was done by O'Malley is speculation and the memo is hearsay. (PV5, 659-661), & *see* C. Ehrhardt, Florida Evidence §805.1 (2011 edition) & *see U.S. v. Robinson*, 239 Fed.Appx 507 (11th Cir. 2007).

The court held that the decision to rely on the memo was reasonable because counsel "has used [him] in the past and ***felt*** was a very confident investigator." (PV16, 2516). Counsel failed to adequately investigate and to introduce evidence that demonstrated his client's factual innocence or that raised sufficient doubt as to undermine confidence in the verdict and thus rendered deficient performance. *See Hart v. Gomez*, 174 F.3d 1067, 1070-1071 (9th Cir. 1999) & *see Downs v. State*, 453 So.2d 1102, 1108 (Fla. 1984) *quoting Strickland*, 466 U.S. at 694. Jackson's life lies in the balance and placing blind faith in a feeling towards a supporting member of the defense team is not reasonable trial strategy especially when it a witness as vital as Lewis, who can exonerate Jackson. *See Terrero v. State*, 839 So.2d 873 (Fla. 3d DCA 2003) & *Wiggins*, 539 U.S. at 521. Keating's decision to blindly rely on a vague memorandum that arguably did not reconcile the last time that Lewis saw his sister, was ineffective and outside the realm of professional conduct. *See Strickland*, 466 U.S. at 688 & 694.

Keating had O'Malley interview the victim's uncle, Larry Paulk, but he also

spoke to him over the phone. Yet, he did not do this minimal task with Lewis, which was a detrimental oversight by counsel. Counsel simply relied on a memo to reconcile the dates and to assess credibility of Lewis. Counsel's failure not to personally reconcile the dates through a deposition or personal interview with Lewis was detrimental, since it would have put Paulk alive after the alleged date of the kidnapping and murder. It would be up to the jury to determine the credibility of the victim's own brother versus the State's key cooperating witnesses, Hunt and Latisha Allen ("Allen"). Both Hunt and Allen did not go to the police until after Paulk's body was found those bringing their motive into question.

Lord v. Wood provides strong and persuasive argument as to why Keating's failure is considered ineffective and also prejudicial by stating the following (This is also fully quoted and discussed in Jackson's closing remarks):

> We would nevertheless be inclined to defer to counsel's judgment if they had made the decision not to present the three witnesses after interviewing them in person. ***Few decisions a lawyer makes draw so heavily on professional judgment as whether or not to proffer a witness, trial. A witness's testimony consists not only of the words he speaks or the story he tells, but of his demeanor and reputation. . . . But counsel cannot make such judgments about a witness without looking him in the eye and hearing him tell his story.***
>
> Here, counsel appear to have made their decision to exclude the three witnesses based on a vague impression-- apparently a misimpression--that the police and investigators who spoke to the witnesses did not find them credible. We find no such suggestion in the various reports, and this impression may have been dispelled had counsel talked to the boys. Having now heard their story--from their affidavits and district court testimony--***we believe a competent attorney would not have failed to put them on the stand.***

We cannot say that the government's case was so strong that the testimony of these three witnesses could not have raised a reasonable doubt in the minds of the jurors. ***Rather, we find the possibility that their testimony would have led to Lord's acquittal to be "sufficient to undermine confidence in the outcome." Strickland, 466 U.S.*** at ***694. . . . As it is, we find ourselves "in grave doubt as to the harmlessness of an error that affects substantial rights," and must conclude that counsel's omission of this evidence prejudiced Lord's defense***. *O'Neal v. McAninch*, 513 U.S. 432, 445 (1995).

We have found similar omissions of potentially exculpatory evidence to constitute deficient, and prejudicial, performance by counsel. We held in *Brown v. Myers* , 137 F.3d 1154, 1158 (9th Cir. 1998), ***that trial counsel's failure to investigate and put on the stand possible alibi witnesses constituted ineffective assistance which "prejudiced [petitioner] to the extent that it undermines confidence in the outcome of his trial.***" In *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994), Sanders's brother made out-of-court confessions to the murder for which Sanders was convicted. We determined that counsel's failure to call the brother to testify at trial or, if he invoked the Fifth Amendment, to introduce the brother's extra-judicial statements, was professionally deficient performance. *See id.* at 1457-60. Such evidence would clearly have provided a strong defense and "[counsel's] failure to investigate [was] inexplicable, as [was] his failure to utilize [the brother's] confession, except as the result of incompetence and indifference." *Id.* at 1459. In *Hart v. Gomez*, 174 F3d. 1067, Hart was convicted of molesting his daughter during visits to a camping resort. His daughter had testified that "Hart never molested her during visits on which he was accompanied by another adult." *Id.* at 1067. Hart's girlfriend testified at trial that she had been with him during all of the trips alleged in the information, and had witnessed no molestation. *See id.* Hart's trial counsel, however, did not introduce grocery receipts and the girlfriend's personal calendars, which would have corroborated her testimony that she was present at all of the trips and, thereby, "***demonstrate[d] [Hart's] factual innocence [.]" Id. at 1070. We concluded that "[the girlfriend's] evidence, if believed by the jury, would have demonstrated the truthfulness of her testimony and established that . . . no molestation occurred during the time period set forth in the information--or at the least that the molestation as charged in the information had not been proved beyond a reasonable doubt.***" *Id.*

Footnotes:

[8] Counsel is not obligated to interview every witness personally in order to be adjudged to have performed effectively, *see LaGrand v. Stewart*, 133 F.3d 1253, 1274 (9th Cir.), cert. denied, 119 S.Ct. 422 (1998); *Eggleston v. United States*, 798 F.2d 374, 376 (9th Cir. 1986). However, where (as here) a lawyer does not put a witness on the stand, his decision will be entitled to less deference than if he interviews the witness. The reason for this is simple: ***A lawyer who interviews the witness can rely on his assessment of their articulateness and demeanor--factors we are not in a position to second-guess.***

[9] Of course, had Lord's attorneys been certain that Holden, Huff and Ayers's statements were false, the rules of professional conduct would have precluded them from putting the witnesses on the stand. *See* Restatement (Third) of the Law Governing Lawyers S 180(1) (c) (Tentative Draft No. 8, 1997) ("A lawyer may not . . . offer testimony or other evidence as to a material issue of fact known by the lawyer to be false."). Counsel also were under no obligation "to offer testimony or other evidence that [they] reasonably believe [ ] is false, even if [they] do [ ] not know it to be false." Id. S 180(3). However, the Restatement makes it clear that ***"[a] lawyer should not conclude that testimony is or will be false unless there is a firm factual basis for doing so. Such a basis exists when facts known to the lawyer or the client's own statements indicate to the lawyer that the testimony or other evidence is false."*** *Id.* S 180 cmt. c. Lord's attorneys have never claimed that they knew the witnesses' statements were false, nor that they were in possession of any facts beyond those contained in the police and investigator reports. Based on that evidence, Lord's lawyers certainly could have concluded that their client was guilty, and that the boys must therefore have been mistaken. But counsel's belief in their client's guilt certainly cannot create an ethical bar against introduction of exculpatory evidence.

184 F.3d 1083, 1094-1096 (9th Cir. 1999) *cert denied by Lambert v. Lord*, 528 U.S. 1198 (2008) (internal citations, quotations, and footnotes included)(emphasis added); *see Avila v. Galaza*, 297 F.3d 911(9th Cir. 2002); *see Riley v. Payne*, 352 F.3d 1313 (9th Cir. 2003)(PV16, 2434-2436). It is clear that counsel's failure to

personally interview or depose Lewis was a disservice to his client as he could never make a judgment as to Lewis' credibility. *See Hart v.* Gomez, 174 F.3d at 1070. In fact, there is no credible evidence that the defense even showed Lewis his hand-written statement prior to making the decision not to put him on the stand. Moreover, as a matter of justice, Jackson's jury was prevented from hearing and assessing the victim's brother's consistent testimony and the jury could have reasonably acquitted Jackson. S*ee O'Neal v. McAninch*, 513 U.S. 432; *see Rozzelle v. Sec'y, Florida Dept. of Corr.*, 672 F.3d 1000 (11th Cir. 2012) *cert. denied*, 133 S. Ct. 351 (U.S. 2012)(actual innocence); *see Avila*, 297 F.3d at 921-922; *see Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000) & *see Arthur v. Allen*, 452 F.3d 1234 *opinion modified on reh'g*, 459 F.3d 1310 (11th Cir. 2006)(actual innocence).

Keating excused his conduct by stating that he wanted to "tread carefully with family members" because of their loss and the rule of sequestration. (PV5, 718). This reasoning is flawed and displays counsel's ineffectiveness when faced with exculpatory evidence. A deposition of Lewis would have removed any worries for counsel about his testimony and the effect of any cross-examination of the victim's family. Counsel acknowledged that he had deposed almost every witness in this case. (PV5, 717). Keating testified that spoke to Larry Paulk, over the phone which shows that he did not have issues speaking directly to family

members. Based on the allegations of the case, counsel never needed to "rough up" any family member. The family members lent to counsel's defense that the victim led a risky lifestyle. Once again, Lewis clearly testified that he would make himself available to talk to Jackson's attorneys. (PV2, 170). His excuse is not reasonable considering the exculpatory value of Lewis' statement and the fact that Jackson is facing the death penalty based on cooperating witness statements. *See Tyler v. State*, 793 So.2d 137, 141 (Fla. 2d DCA 2001). It should be noted that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes a particular investigation unnecessary." *Strickland*, 466 U.S. at 691; *see Marshall v. State*, 854 So.2d 1235, 1247 (Fla.2003) & *see Yarbough v. State*, 871 So.2d 1026, 1031-1032 (Fla. 1st DCA 2004). The interview of the victim's brother was a necessary investigation that was deficiently performed to Jackson's detriment. *See Downs*, 453 So.2d at 1108 *quoting Strickland*, 466 U.S. at 694.

The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, §4.1, commentary (rev. ed. 2003), as recognized by the United States Supreme Court, addresses in part the role of the investigator and counsel in death penalty cases as follows:

> ***Although some investigative tasks, such as assessing the credibility of key trial witnesses, appropriately lie within the domain of counsel,*** the prevailing national standard of practice forbids counsel from shouldering primary responsibility for the investigation.

The guideline does not absolve counsel's role when investigating witnesses in a

death penalty, in fact the task of assessing credibility of the witness lies with the domain of counsel. With respect to communicating with a victim's family, the guidelines state as follows:

> a. Barring exceptional circumstances, counsel should ***seek out and interview potential witnesses***, including, but not limited to:
> (1) eyewitnesses or other witnesses having purported knowledge of events surrounding the alleged offense itself;
> (2) potential alibi witness;
> . . .
> (4) ***members of the victim's family***.

ABA Guidelines for Appointment and Performance of Counsel in Death Penalty Cases §10.7, commentary (emphasis added). Keating indicated some familiarity with the ABA guidelines but then testified that he was unaware of the ABA guidelines. (PV5, 593-594). It should be noted that in *Wiggins*, 539 U.S 510, 123 S.Ct. 2527, and *Williams v. State*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), stand for the proposition that the ABA guidelines are the prevailing norms of practice. Counsel failed to meet the prevailing norms by failing to interview the victim's brother, who had exculpatory testimony that would cast doubt on the State's theory that the victim was kidnapped and murdered on November 9, 2004. *See Downs*, 453 So.2d at 1108 *quoting Strickland*, 466 U.S. at 694.

As to prejudice, first, the evidence at trial against Jackson was and remains gravely circumstantial. Secondly, there is no doubt that the date of the purported kidnapping and murder is set on ***November 9, 2004***, by the State's evidence, trial.

The State's closing argument confirms the date of the kidnapping and murder as "fixed, November 9, 2004." (PV8, 993) & s*ee Jackson*, 25 So.3d at 522. The court only refers to November 9, 2004, as the kidnapping date, when it is also the purported date of the murder. The court found with regard to prejudice that strong evidence was presented that the last time the victim was seen was on November 9, 2004, based on the testimony of witnesses. The court states that the "credibility of the witnesses was crucial" in the State's largely circumstantial case. (PV16, 2505). Yet, the court did not make a credibility assessment as to Lewis' testimony in coming to its determination regarding the prejudice prong. *See Shere v. State*, 742 So.2d 215, 218 n.8 (Fla. 1999). It is clear from the evidence presented that the victim's brother did not know Jackson and thus has no bias in favor of him. (PV2, 38-39). What cannot be overlooked is that the victim's brother is still very emotional about her loss evident from his demeanor on the stand.

Jackson asks to look at the credibility of the trial witnesses versus that of Lewis. This detailed analysis is crucial in determining just how detrimental it was to fail to present Lewis to the jury. Such an analysis was not done by the court that relied on its general memory of the evidence and would demonstrate a breakdown in the adversarial process and it shows that the confidence in the outcome has to be undermined. *See Downs*, 453 So.2d at 1108-1109. The State stated the strength of its circumstantial case in its closing remarks was its witnesses:

> "[w]e're standing where we are here, we're in this courtroom today, in ***a large part because of certain people that came forward***, and I'm talking about the ones I've spoken about: ***Latisha Allen, Fred Hunt, Calvin Morris, Curtis Vreen, V'Shawn Miles. We're here because they came forward to talk to the police about what happened on November the 9th*** and what these defendants said and did about it when it was happening and after it happened."

(RV24, 1289-1290). The State's main witnesses are all involved in criminal behavior as related to drugs, which is a driving motivation in this case.

Morris, who was allegedly involved in the theft of Jackson's drugs and jewelry, was so worried for his cousin, Paulk, yet he failed to call the police because he had outstanding warrants. (RV18, 312-316, 321 & 340-345). It was not until, March 1, 2005, after Paulk's body was found, that he gave a statement to the police. (RV18, 347). Morris was also a patron of Allen's home where drugs were dealt. (R. V20, 491-484). He allegedly told his grandmother, Sarah Key, about the kidnapping and yet she did not call the police and could not testify as to when she was told about some guys taking Paulk by Morris. (RV20, 528-536). There is no sense of urgency about the missing Paulk from Ms. Key or Morris. (RV20, 531-536).

Curtin Vreen ("Vreen") a multi-convicted felon and a drug dealer also testified for the State. (RV20, 542-545 & 569-572). He stated that the last time that he saw Paulk "[s]he walked on her own. He [Jackson] didn't force her, and then they walked together to Calvin's car." (RV20, 554-555). Vreen did not call the

police because he was dealing in Ecstasy. (RV20, 588-589). The first time he gave a statement was while he was in custody in May of 2005. (RV20, 590-592).

Allen's home was a prominent place to deal drugs and the scene of the kidnapping. She had her two-year old child living in this 'drug house' as well. (RV20, 609-610). Her boyfriend, Dewayne Thomas, is best friends with Hunt. (RV22, 912-913). It should be noted that Paulk's remains were first found on April 17, 2005. (RV17, 186). They were identified, a later date by Dr. Jan Westberry, a forensic dentist. (RV18, 290-291 & 293-298). The first time that Allen goes to the police is with an upset Hunt [over money owed] on April 20, 2005. (RV21, 649-651 & 673-676 & RV22, 905-906). Allen testified that when she went to the police, she only knew that the remains of a woman had been found. (RV21, 649-651). If Allen and Hunt did not know what happened after the purported kidnapping and where Paulk's body was buried, then it is very suspicious that they would only come forward shortly after the remains that have yet to be identified were discovered. It can be argued that Allen and Hunt went to the police first to curry favor and to minimize their culpability.

Hunt, a convicted felon's trial testimony demonstrated that he was very involved in the kidnapping. (RV21, 733-777). He was also involved in the drug business at Allen's house and later in the drug business with Jackson. (RV21, 780 & RV22, 904-905). Hunt and Jackson allegedly started to develop problems in

their relationship. (RV21, 787-791). Hunt testified that when the unidentified remains were found, he knew to be Paulk's, that he went to church, spoke to his brother, and then he decided to go to the police on April 20, 2005. (RV22, 833-837). Yet, Allen testified he was upset about money owed to him on the day they went to the police. (RV21, 649-651 & 673-676). Interestingly, the amount of money that Paulk allegedly stole from Jackson was ***eight hundred dollars*** and the money that Hunt claimed Jackson owed him was also ***eight hundred dollars***. *See Jackson*, 25 So.3d at 522 & 524. Hunt's conscience was not affected while he was conducting his drug business until the remains that he knew to be Paulk's were found. Furthermore, Hunt gave conflicting statements, least four times throughout the case. (RV22, 837-838, 917-918, 920-921, 924, 931-932, 935-936 & 953-954). Hunt characterized his statements as not untruthful just that they were not complete. (RV22, 887-888). He did not come forward until Paulk's body was found and his initial statements implicated Jackson and minimized his actions. (RV22, 837-838, 920-921 & 931-932). Regardless of what Hunt testified, it is clear that Hunt testified with the hope that it would benefit him in his kidnapping charge, and that is why he went first to the police once the unidentified remains were recovered. (RV22, 869-870). Hunt had a motive to lie and to implicate Jackson, because he did not want to be the one charged with the murder count.

V'Shawn Miles ("Miles")[3], also a drug user, is another witness whose credibility is at issue. Miles by her testimony is in effect an outsider and not part of the individuals from Allen's apartment until 2004. (RV23, 992-997). In November of 2004, she had a conversation with Morris about Paulk's disappearance and then in 2005, she is able to convince Jackson to allegedly "open up" about Paulk's disappearance. (RV23, 994-995 & 996-997). It is unreasonable that Jackson who never spoke to those around him about the crime would open up to a stranger.

The credibility of all of the State's lay witnesses is severely undermined by Lewis' credible testimony. Lewis has no bias or motive to lie in this case. He loves his sister, he still lives with their grandmother, and his was very emotional when testifying. Lewis is a consistent and credible witness who came forward to testify that his sister was alive after November 6, 2004, and that is why the State did not put him on the stand, when they had put on the other family members and friend of Paulk.

Lewis, the victim's brother's testimony is quite powerful and his testimony clearly undermines the confidence in Jackson's convictions. In viewing the totality of the circumstances, counsel's failure to investigate and present Lewis' exculpatory testimony fell below the range of competency demanded of attorneys

[3] Miles is also involved in Argument III, claim 6, where counsel failed to impeach her testimony with her video-recorded statement where Jackson allegedly told her that he did not know what happened to the victim.

in criminal cases. *See Young v. Zant*, 677 F.2d 792 (11th Cir. 1982). Moreover, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Downs*, 453 so.2d at 1108. Lewis provided an obvious and strong defense. *See Young*, 677 F.2d at 799. It is clear that counsel's failure to properly investigate and present Lewis' testimony constituted prejudicial ineffective assistance of counsel depriving Jackson of his rights afforded by the 4th, 5th, 6th, 8th, and 14th Amendments to the U.S. Constitution and of his corresponding rights pursuant to the Florida Constitution. *See Strickland*, 466 So.2d 668 & *see Young*, 677 F.2d at 798 *citing Cuyler v. Sullivan*, 446 U.S. 335, 344, 100 S.Ct. 1708, 1715-1716 (1980). Therefore, Jackson requests this Court to reverse the court's ruling and grant a new trial.

Claim 6 was erroneously denied by the court that found that the serial killer defense was a reasonable trial tactic as Keating was trying to raise grains of reasonable doubt to obtain a not guilty verdict, a verdict for a lesser, or to get a hung jury. (PV16, 2517-2518). This finding is in error because common sense would dictate that the serial killer defense did not exist and could never raise any reasonable doubt even for one juror. The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, §10.10.1, Revised Edition, February 2003 states clearly that "[a]s the investigations mandated by Guideline 10.7 produce information, counsel should formulate a defense theory.

Counsel should seek a theory that ***will be effective*** in connection with both guilt and penalty, and ***should seek to minimize any inconsistencies***." The greatest inconsistency in this case was the testimony of Skipper which completely contradicted the serial killer defense.

Skipper's testimony failed to support the serial killer defense. Keating unreasonably failed to competently investigate the defense before presenting it. *See Wiggins* 123 S.Ct. at 2538. Keating was clearly not aware of Skipper's entire testimony but put him on without knowing what the witness would say. (PV5, 606-607). This was a very dangerous act to the detriment of Jackson's credibility with the jury. Keating's reasoning that he wanted to establish the initial parameters of the serial killings in comparison to Paulk's death and then to "see if [he] could get anything more" is not sound trial strategy. In fact, it was reckless for counsel to put forth this defense without fully investigating and knowing Skipper's testimony. Moreover, it destroyed his credibility with the jury because Skipper completely contradicted counsel's position that the serial killer may have killed Paulk.

Keating unreasonably excused his poor decision by stating that Skipper's testimony did not hurt his case. (PV5, 474-475). Yet, he acknowledged that Skipper was "an unfavorable witness" and did not want to testify. (PV5, 475). His belief that the serial killer defense was "viable" is unreasonable. (PV5, 475). The serial killer defense took several hits to the point that there was no sustainable

serial killer defense. The numerous dissimilarities between Paulk's death and the serial killings were highlighted by Skipper, trial to the detriment of the defense. Eventually, Skipper testified that "there's strong evidentiary connections between the three serial cases, and there is no connections whatsoever with the Pallis Paulk case." (RV23, 1065). Counsel also conceded that the "dissimilarities came out, trial." (PV5, 479). This failure was equivalent to putting on no defense and only destroyed counsel's credibility with the jury.

It would have been a more prudent and sound trial decision not to put on this serial killer defense. Jackson was prejudiced by this poor defense which was the only focus of counsel's case in chief because it "mocks" a jury's commonsense and injures the credibility of the defense with the jury. An alternative theory for defense that counsel could have offered was to suggest that the cooperating co-defendant, Hunt may have committed the offense and had equal opportunity to do so. Instead, counsel opted for the elusive third person killer instead of pursuing a likely suspect as Hunt, who had associations with Paulk, gave inconsistent statements, and had motive to lie and blame Jackson.

Counsel testified that he was satisfied with putting Skipper on the stand because he got the serial killer defense in front of the jury and he "could argue that in closing" as a "reasonable hypothesis of innocence [was] that the serial killer had done this." (PV5, 475). His closing remarks clearly demonstrated his lack of

confidence in this serial killer defense because he completely ignored it until he was about to walk away from the jury. (RV25, 1348). This act undermined the credibility of counsel and Jackson's defense with the jury, when it is obvious that even Keating did not consider his serial killer defense important enough to remember. The serial killer defense as presented was tantamount to no theory of defense. Common sense would dictate that this serial killer defense was a terrible defense. Keating's decision was clearly "outside the broad range of reasonably competent performance under prevailing professional standards." *See Maxwell v.* Wainwright, 490 So.2d 927, 932 (Fla. 1986) *citing Strickland*, 466 U.S. 668.

Keating should have retained and consulted an expert in criminal profiling and victomology such as a forensic criminologist expert prior to putting forth this ineffective serial killer defense. Skipper testified that a task force was created to investigate the 3 serial killings which included a criminal profiler. (RV23,1062-1063). Turvey would have clearly advised not to put forth the serial killer defense because all the newspaper articles do are raises questions and do not give answers. Those answers, especially as to the dissimilarities, came out during the trial through Skipper and by then it was too late. This sort of analysis was never done in Jackson's case to the detriment of the credibility of his defense with the jury. The jury heard from the only defense witness Skipper who destroyed any common scheme or plan between the killings and Paulk's death. Turvey's testimony

highlighted the sheer unreasonableness of Keating's decision to put on the uncorroborated serial killer defense. Turvey highlighted that the serial killer defense was obviously unreasonable and should not have been used. (PV4, 327-334 & 338). This serial killer defense should never have been put before the jury because it failed as a defense in any manner.

Keating's decision to rely on this defense on its face was an unreasonable decision and furthermore without securing the aid of an expert like Turvey to help develop the viability of the defense was a strategic choice that fell outside the acceptable range of competent choices. *See Strickland*, 466 U.S. at 689 *quoting Michel v. State of La.*, 350 U.S. 9, 76 S.Ct. 158, 100 L.Ed. 83(1955). As stated before, the decision was reckless and cost counsel and his client their credibility with the jury especially coupled with counsel's own action in forgetting his defense during closing remarks. Counsel's poor presentation of their serial killer defense hurt Jackson's defense and injured counsel's credibility before the jury in such a serious manner that Jackson was deprived of a fair trial. *See id.* at 687. The court erred in finding that it was a reasonable trial tactic to develop grains of reasonable doubt. (PV16, 2517-2518). With Jackson's life, stake, counsel's decision to throw a defense against a wall and see if it sticks was unreasonable and prejudicial because no viable, competent or reasonable defense was ever presented and it destroyed the credibility of his case with the jury. *See Downs*, 453 So.2d at

1108-1109. The confidence in the outcome based on this non-existent defense which mocks commonsense is certainly undermined. It is impossible that any grains of reasonable doubt could have been raised by this incredulous defense. This ineffectiveness deprived Jackson of his rights afforded by the 4th, 5th, 6th, 8th, and 14th Amendments to the U.S. Constitution and of his corresponding rights pursuant to the Declaration of Rights under the Florida Constitution. *See Strickland*, 466 So.2d 668. Therefore, the lower court's decision should be reversed and a new trial granted.

Claim 11 was erroneously denied because the court erred in finding that Keating was not deficient in discovering the articles and that even if he was, there was no prejudice. (PV16, 2522). The court found that due to the delay in the charges being dropped and Paulk's disappearance, it would be unreasonable to argue that something that happened almost 2 years ago would result in her death. (PV16, 2522). Keating failed to competently investigate the victim's background when there was publicly available information of her background as an informant from the articles and the MBI records. This information would have aided counsel in developing a coherent theory of defense and to develop other named individuals who had a motive to harm. The failure to do a simple internet search for the victim's name was unreasonable investigation. *See Wiggins*, 123 S.Ct. at 2538.

Keating established prejudice by stating that his trial strategy would have

been affected. He testified that this information "would have expanded the potential third party possible suspects who had a motive or opportunity to want to hurt or harm Pallis Paulk." (PV5, 490). It would have strengthened his presentation because "this stuff just seemed more specific and that probably would have assisted at trial." (PV5, 490). Also based on a review of the MBI records, his trial strategy is affected because it gives his defense more specifics and credibility. (PV5, 493-494). Keating recognized that the MBI information gave him an opportunity to argue opportunity and motive. (PV5, 561). Keating resolved the delay in the time period between the Cleo's case being closed and her disappearance by stating that he thinks that "retaliation is usually done quicker. Although, [he has] heard the statement that revenge is better served cold." (PV5, 561 & PV16, 2521-2522). He clearly provided testimony that demonstrated that his trial strategy and defense would have been changed and would have been more credible.

Keating's failure to investigate readily available records on Paulk's background and present potential known suspects who had a motive to harm Paulk prejudiced Jackson. Keating's predominant defense was that Paulk was murdered by an unknown third party. The aforementioned information would have supported this theory of defense by portraying the dangerous environment Paulk was involved in and by identifying other potential individuals who had motive and

opportunity to harm her and by increasing the geography of potential enemies of Paulk. It would have been more effective that a serial killer defense or unknown third-party killer defense. The court committed error in finding that there is no prejudice and that counsel was not deficient for fully investigating the victim's background, and should be reversed and remanded for a new trial.

Claim 17 was erroneously denied because the court erred in finding that it was counsel' tactical decision to focus on Jackson's mental health issues as mitigation. (PV16, 2525). The court found that it was reasonable not to focus on Jackson's drug use, drinking, and MDMA pill abuse. (PV16, 2525-2526). The court found there was plenty of evidence in the record of Jackson's drug use [it was not presented as mitigating evidence]. (PV16, 2525-2526).

Keating cannot hide behind trial tactic if it was not reasonable and was simply ignorance of an obvious and prevalent mitigating factor. No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, or on the failure to properly investigate or prepare. *See Brewer v. Aiken*, 935 F.2d 850 (7th Cir. 1991); *see Kenley v. Armontrout*, 937 F.2d 1298 (8th Cir. 1991); *see Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005), held that counsel rendered deficient performance because of a failure to review Rompilla's prior conviction, a failure to obtain *school records*, a failure to obtain

records of Rompilla's prior incarcerations, and a failure to gather evidence of a history of substance abuse. *See Parker v. State*, 643 So.2d 1032, 1035 (Fla. 1994); *see Clark* v. *State,* 609 So.2d 513 (Fla. 1992); *see Ragsdale*, 798 So.2d 713 (Fla. 2001) & *see Mahn v. State,* 714 So.2d 391 (Fla. 1998). The failure to prepare and present evidence of chronic substance abuse can constitute ineffective assistance of counsel. *See Heiney v. State*, 620 So.2d 171 (Fla. 1993); s*ee also*, *People v. Wright*, 488 N.E.2d 973 (Ill. 1986). Unrebutted evidence that a defendant's "reasoning abilities were substantially impaired by his addiction to hard drugs" is "significantly compelling" mitigation. *Songer v. State*, 544 So.2d 1010, 1011 (Fla. 1989). Keating agreed that he never argued to Jackson's jury that they could consider substance abuse history as mitigating evidence. (PV5, 504).

Counsel's failure to investigate this ***specific*** mitigation and to present it to the jury and the judge is egregious in the face of how much evident evidence was in the records, through witnesses, and found by their expert, Danziger. Evidence relating to a defendant's own long-standing substance abuse and addiction has been found to be an important nonstatutory mitigator as well. *See Clark,* 609 So.2d 513; *see Mahn,* 714 So.2d 391 & s*ee Ragsdale*, 798 So.2d 713. Danziger's testimony demonstrated that there was abundant evidence of Jackson's prevalent substance abuse history. (PV6, 669-678). Danziger testified about the significant amount of information he obtained regarding Jackson's substance abuse history which

counsel did not follow-up on. Bonamo discussed with Danziger his testimony and was present for the deposition, where Danziger testified to evidence of substance abuse. (PV3, 152-153).

Keating admitted that he knew Ray smoked a lot of pot daily but gave no regard to Danziger's findings and the prevalence of the substance abuse. (PV5, 498-499). Keating's memo [State's Exhibit 1] demonstrated that counsel was ignorant as to substance abuse involving cannabis and alcohol because he wrote that Jackson smoked pot daily, all day, drank Hennessey liquor, and sold drugs; yet Keating indicated that Jackson denied drug use. This memo does not make sense and shows that counsel did not heed his expert's position in investigating this mitigator. Keating did not think an expert was required for marijuana use. (PV5, 500). This position is contrary to Danziger's diagnosis that Jackson had cannabis dependence. (PV6, 680-681). Keating also had in his possession a letter from Jackson to the drug court begging for help with his substance abuse problem, that he ignored. (PV5, 515-518).

Danziger's diagnosis should have further investigated and developed as positive mitigating evidence portraying Jackson as an individual plagued with addiction and not just a drug dealer. (PV6, 679) & *see Larzelere*, 979 So.2d at 207[4]

[4] "The State argues that we should not find that Larzelere was prejudiced because this 'mitigation' evidence would have been more harmful than helpful to her case. . .While we agree the State could have presented rebuttal evidence during the

& *see Sears v. Upton*, 130 S.Ct. 3259, 3264, 177 L.Ed.2d 1025 (2010)[5]. Counsel could have used Danziger to testify that "[i]t is rare and uncommon for people to become aggressive, angry, hostile on cannabis, and, actually, the converse" and that "generally, it produces sort of a peaceful, euphoric, pleasant high, reduces anxiety, not generally associated with anger, hostility, or aggression." (PV6, 678). In the face of all of this evidence, it is completely unreasonable for counsel to acknowledge that the only information he had was that Jackson smoked pot. (PV5, 504). Danziger testified that in his discussion with counsel regarding cannabis dependence that it was focused on, the time of the crime, but if counsel wanted to ask him about substance abuse, he would have found there was a history of cannabis dependency. (PV6, 682-684). Danziger provided evidence that Jackson did have a substance abuse history, specifically cannabis, and he also spun it in a positive manner to show that Jackson's dependence on cannabis would generally make him not prone to violence which would be contrary to the image of a violent

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penalty phase, this does not change our conclusion that Larzelere was prejudiced by counsel's penalty-phase performance."

[5] "[T]he fact that along with this new mitigation evidence there was also some adverse evidence is unsurprising, . . . given that counsel's initial mitigation investigation was constitutionally inadequate. Competent counsel should have been able to turn some of the adverse evidence into a positive-perhaps in support of a cognitive deficiency mitigation theory. . . This evidence might not have made Sears any more likable to the jury, but it might well have helped the jury understand Sears, and his horrendous acts-especially in light of his purportedly stable upbringing. Because they failed to conduct an adequate mitigation investigation, ***none*** of this evidence was known to Sears' counsel. It emerged only during state post-conviction relief."

drug dealer that the State portrayed him to be. Danziger advised counsel that there was an Axis I diagnosis of cannabis dependence in remission in the controlled environment of the jail. (PV6, 689). Yet, counsel did nothing to further investigate or present this weighty mitigator. Counsel also failed to develop alcohol as a mitigator despite his knowledge. (PV5, 504-505). Even though Danziger could not make an alcohol abuse diagnosis, he suspected that that Jackson was minimizing his alcohol abuse and opined that he "was thinking that maybe there's more alcohol use than he's acknowledging." (PV6, 689-690). Even though Keating looks for help in terms of mitigating evidence wherever he can, he failed to follow-up on Danziger's opinion regarding the Axis I diagnosis and his suspicion of an alcohol abuse diagnosis. (PV5, 509).

Inconsistent with Danziger's testimony, counsel testified that "both he [Danziger] and I agreed that marijuana use in Ray's case would not be an effective mitigator." (PV5, 511). Danziger clearly opined that "there's a history of cannabis dependence" as quoted previously. (PV6, 682-684). Danziger is not excluding cannabis dependency or substance abuse history as a mitigating factor. (PV6, 693-694). Counsel failed to recognize the existence of substance abuse in Jackson's life. Danziger's statement regarding Jackson's heavy use of cannabis that "if they [the defense attorneys] wanted to ask me about it, I certainly could say yes, cannabis dependence, which indeed, I did testify in my deposition" contradicts

Keating's position. Keating thought it carried little weight and was a misdemeanor that he did not think it would help. (PV5, 502). His reasoning demonstrates that he had no intention to even investigate the depth or severity of Jackson's substance abuse and to have Danziger explore it for its mitigating value. Counsel made a decision not to pursue drug abuse without fully investigating this mitigator. A full investigation and presentation would have portrayed Jackson as a person consumed by his addiction and not just a drug dealer. Both Buffington and Danziger recognized that Jackson's risky behavior while incarcerated was a sign of substance abuse and addiction. At the hearing, Jackson's substance abuse history and addiction were fully developed by Buffington, Mrs. Jackson, and McLaury; and to an extent by Danziger. Despite all of the evidence of substance abuse, counsel never pursued this mitigator and did not even request that Danziger speak to other witnesses to corroborate Jackson's substance abuse. (PV6, 690-691).

Counsel failure to further investigate Jackson's substance abuse history and addiction was prejudicial because the jury never heard or considered this weighty statutory mitigator to support a life recommendation. Moreover, none of the available evidence of the addiction that plagued Jackson's life was presented to the judge. Therefore, the court could not make a finding as to this mitigator or assign any weight to it. Counsel failed to even raise this valid non-statutory mitigator in its sentencing memorandum or, the *Spencer* hearing. *See Allred v. State*, 55 So.3d

1267; *see Davis v. State*, 2 So.3d 952, 962 (Fla. 2008) ("a defendant ***must*** raise a proposed nonstatutory mitigating factor") & *see Lucas v. State*, 568 So.2d 18, 23-24 (Fla. 1990). Therefore, the jury is completely in the dark that substance abuse history can be considered as a non-statutory mitigator to tip the scales in favor of a life sentence. This is especially important in this case, because Jackson was described as a drug dealer in the guilt phase. The judge also cannot find and give weight to a non-statutory mitigator, unless it is specifically raised and presented. Any argument that there was some evidence of drug abuse that came out at the trial is not valid because it was not put forth as mitigating evidence. *See Allred*, 55 So.3d 1267; *see Davis*, 2 So.3d at 962; *see Lucas*, 568 So.2d at 23-24 & *see Sears v. Upton*, 130 S.Ct. 3259.

The record on appeal also provided clues that Jackson had some history of substance abuse in his life. Jackson's family also spoke briefly about exposure of Jackson to substance abuse during the penalty phase. The witness testimonies of Allen, Hunt, Miles, and Vreen all point to a culture of substance abuse surrounding Jackson. Yet, counsel failed to present any mitigating evidence as to the history of substance abuse in Jackson's life. At best, the jury was left with a negative inference that Jackson was just a drug dealer when there was abundant evidence of the controlling and prevalent nature of substance abuse throughout his life. This is strong and weighty mitigating evidence.

Counsel should have presented the evidence of the history of substance abuse in Jackson's life through the testimony of a pharmacologist, such as Buffington to the jury and the judge. Buffington gave a chronological history of the history of substance abuse in Jackson's life starting from pre-natal exposure until adult hood as presented in the Statement of Facts. (PV4, 401-402 & 430-435). Unlike Danziger, Buffington was able to further investigate and corroborate Jackson's substance abuse and addiction during his adulthood after he was released from prison. (PV4, 428-430). Buffington testified that Mrs. Jackson told him that Jackson described to him the escalation of Jackson's substance abuse to the point that she did not recognize him. (PV4, 434). Buffington was also able to explore Jackson's Ecstasy use through his interviews which began about 2003 or 2004. (PV4, 435-436). The evidence of Ecstasy use that should have been followed up on or corroborated but counsel never did. *See Rompilla*, 545 U.S. 374 & *see Ragsdale*, 798 So.2d 713.

Buffington did a complete drug history investigation and opined that substance abuse at times consumed Jackson's life. (PV4, 442). This is very weighty and sympathetic mitigation that counsel did not pursue or present. Counsel failed to follow-up with his expert's findings regarding substance abuse and failed to have his expert interview family and friends to corroborate Jackson's statements about substance abuse. He failed to present evidence of this evident non-statutory

mitigator to the sentencing jury thus Jackson's sentence is rendered unreliable. *See Porter v. McCollum*, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009).

The prejudice resulting from counsel's failure to investigate and present Jackson's history of substance abuse and addiction and to educate the sentencing jury as to effects was severe and obvious. *See Eddings v. Oklahoma*, 455 U.S. 104, 112, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). It is clear that Jackson is not a mere "pot head" or recreational user and Danziger recognized as a threshold that Jackson had cannabis dependency and possible alcohol abuse. This information was readily available to counsel and counsel failed to follow-up on this mitigator. *See Haliym v. Mitchell*, 492 F.3d 680, 718 (6th Cir. 2007); *see Wiggins*, 539 U.S. at 528 *quoting Strickland*, 466 U.S. at 690-691 ("(S)trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitation on investigations."). There is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Jackson would have been sentenced to life in prison. It would have "struck a different balance" between the aggravators and mitigators. *Wiggins*, 539 U.S. at 537.

Counsel had an abundance of information as to Jackson's substance abuse history to present as a specifically requested mitigator. The hearing demonstrated that Jackson he suffered from a severe addiction, which should have been

presented to the jury and the judge to mitigate the guilt phase characterization that he is just a drug dealer. Counsel could not make a strategic decision because there was no competent investigation done. Counsel either ignored or missed this weighty mitigator. The court's ruling should be reversed and the case remanded for a new penalty.

ARGUMENT II

THE POST- CONVICTION COURT ERRED IN DENYING JACKSON'S GUILT AND PENALTY PHASE LEGAL CLAIMS THAT WERE RAISED IN HIS MOTION TO VACATE JUDGMENTS AND SENTENCE PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851.

(A) Introduction and Standard of Review

The introduction and standard of review is the same as in Argument I.

(B) Argument

Jackson reiterates its arguments as to legal claims 14, 15, 16, 20, 22, and 23 as presented in his Motion to Vacate. (PV11, 1475-1590). The court denied all these claims. (PV8, 1038-1078 & PV16, 2519-2527). The denial constituted prejudicial ineffective assistance of counsel whereby Jackson was deprived of his rights afforded by the 4th, 5th, 6th, 8th, and 14th Amendments to the U.S. Constitution and of his corresponding rights pursuant to the Florida Constitution. *See Strickland*, 466 So.2d 668.

Claim 14 argued that counsel failed to object to several prosecutorial comments during closing remarks, specifically as to the following remarks:

"So she realizes, Hey, I messed with the wrong guy. All right? So you can just -- and, in her mind, you know, she's probably hoping, Well, I'm going to get my butt kicked or something's going to happen, but I'll just try to weather this and get out of here. I need to just take my lumps because I've messed with the wrong guy. And then, plus that, there's not much – not much sense, that point, with all the people there and the way this has gone on and Jackson having a gun, that Mr. Morris -- it's really difficult to fight, that point, tied up in a tub, until – until she gets down, is going down the stairs and gets toward the bottom of the stairs and sees that trunk that's open and knows then, Oh, my God. Here I am, bound up with duct tape, and I'm about to get stuffed in a trunk."

(RV24, 1271-1272).

"And that tattoo mentioned that said "Faith" on her, that was her four-year-old daughter, the time she died. And in spite of what we heard about Pallis Paulk and her lifestyle, hopefully, she would have grown out of that. Hopefully, with the support of her family, she would have reconnected with her daughter. Hopefully. We all have the abiding hope with regard to family and caring and hoping that people learn to live a productive life, but Pallis Paulk never had that chance because these defendants decided that she had to die because she crossed them."

(RV25, 1379-1380).

And as I said, it would have been nice had they come forward sooner, but I'm sure you saw it and can understand what had to be broken through in order for those witnesses to come here and testify. And in spite of their shortfalls, and Lord knows they have shortfalls, *it took courage to come in here in a court of law and testify about what happened*, because, as I said, you'd better believe that fear is a large part -- you've heard testimony about the threats. You've seen it here.

(RV24, 1290)

And not just that. You combine that with the fear, not only the fear of the ones who carried this out, but the fear of being -- of being stigmatized as a snitch, to be held out as someone who testified for the State, especially people who are involved in the criminal justice system. You heard testimony yourself. And that's something that these witnesses actually broke through to come in here and testify about

what happened. And they overcame that in order to let you know what happened in the last few hours of Pallis Paulk's life.

(RV24, 1290-1291).

You know, these witnesses are easy pickings, you know, easy targets for defense lawyers and everybody.

(RV25, 1386).

The serial killer? That's been thrown out there. And this is almost one of these -- it's almost like the spaghetti defense in some respects.

(RV25, 1389).

And the serial killer, that's really grasping, straws with regard to that defense.

(RV25, 1390).

The court denied this claim and in general found them to be fair comment on the evidence and any objections would have been sustained. (PV16, 2522-2524).

In closing remarks, the role of counsel is "to assist the jury in analyzing that evidence, not to obscure the jury's view with personal opinion, emotion, and nonrecord evidence." *Johns v. State,* 832 So.2d 959, 963 (Fla. 2d DCA 2002) *quoting Ruiz. v. State*, 743 So.2d 1, 4 (Fla. 1999). As to the comments quoted at (RV24, 1271-1272) & (RV25, 1379-1380) regarding the victim's speculated thoughts in her last moments about her family, daughter and life that she left behind, the court erroneously found it to be "a fair comment on the evidence" and in rebuttal to Paulk's risky lifestyle. (PV16, 2522-2523). These statements are not facts in evidence and are comments which speculated what Paulk may have been thinking while in the bath tub and to paint a picture of the life that she left behind

particularly saddening that she is leaving her 4 year old daughter. These statements are not facts and only serve to evoke sympathy from the jury towards Paulk and create hostility towards the defendants. *See Urbin v. State*, 714 So.2d 411, 418-421 (Fla. 1998); *see Barnes v. State*, 58 So.2d 157, 159 (Fla. 1951) *see Garron v.* State, 528 So.2d 353, nn.6, 8 & 9 (Fla. 1988) & *see Braddy v. State*, --So.3d--, 37 Fla.L.Weekly S703, 2012 WL 5514368, *43-53 (Fla. Nov. 15, 2012)(*Pariente, J., dissenting*). Furthermore, "(a)n appeal to the jury for sympathy for the victim creates hostile emotions toward the accused." *Wicklow v. State*, 43 So.3d 85, 87 (Fla. 4th DCA 2010) *citing Dial v. State,* 922 So.2d 1018, 1022 (Fla. 4th DCA 2006) & *see Johns,* 832 So.2d at 962.

The statements quoted at (RV24, 1290-1291) vouched for the State's witnesses for being courageous for coming forward. They also showed gratitude. These are improper and not fair comments regarding the alleged threats towards Hunt[6] and Morris[7]. (PV16,2523). These comments evoked compassion and gratitude for witnesses who were subpoenaed to testify. The prosecution improperly vouched for their witnesses. *See Brown v. State,* 787 So.2d 229, 230 (Fla. 2d DCA 2001).

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[6] As discussed in Argument I, Hunt did not come forward until the victim's unidentified remains were found and, the time he was upset with Jackson regarding money owed in the drug business.

[7] This threat was alleged a sign language threat from Wooten to Morris and not Jackson, which again supports why the defendants should have been severed as argued in Argument II. (RV18, 354-364).

The comments quoted at (RV25, 1386, 1389 & 1390) were not fair comments in rebuttal to the defense closing remarks. (PV16, 2524). These comments denigrated the role of the defense attorneys and denigrated their theory of defense. *See Miller v. State,* 712 So.2d 451, 453 (Fla. 2d DCA 1998); *see Lewis v. State,* 711 So.2d 205, 206 (Fla. 3d DCA 1998) & *see Braddy*, 2012 WL 5514368, *43-53(*Pariente, J., dissenting*). The prosecution "instead of focusing on the evidence, argued to the jury that defense counsel was trying to manipulate the jury and that if they agreed with his argument then they were being easily duped." *Wicklow*, 43 So.3d at 87. Such "(c)laims of manipulation and deception by opposing counsel have no place in a closing argument." *Id.* Furthermore, "(r)esorting to personal attacks on defense counsel is an improper trial tactic which can poison the mind of the jury." *Id.* at 87-88 *citing Ryan v. State,* 457 So.2d 1084, 1089 (Fla. 4th DCA 1984). Moreover, "it is worthy of note that it is never acceptable for one attorney to effectively impugn the integrity or credibility of opposing counsel before the jury; even in the absence of a contemporaneous objection, such comments about opposing counsel made during closing argument are fundamentally erroneous." *Id.* at 88 *citing Owens-Corning Fiberglas Corp. v. Crane,* 683 So.2d 552, 555 (Fla. 3d DCA 1996).

This Court has held that "(t)he harmless error analysis places the burden upon the State, as the beneficiary of the errors, to prove there is 'no reasonable

possibility that the error contributed to' the conviction." *Wicklow*, 43 So.3d at 88 *quoting State v. DiGuilio,* 491 So.2d 1129, 1135 (Fla. 1986). Moreover, as "noted in *McDuffie v. State,* 970 So.2d 312, 328 (Fla.2007), the focus of the harmless error test is the effect of the error on the trier of fact. The court further explained that when multiple errors are discovered in a jury trial, a review of the cumulative effect of these errors is appropriate because:

> 'even though there was competent substantial evidence to support a verdict ... and even though each of the alleged errors, standing alone, could be considered harmless, the ***cumulative effect of such errors*** [may be] such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation.'"

Id. at 88 *citing McDuffie*, 970 So.2d at 328 *quoting Brooks v. State,* 918 So.2d 181, 202 (Fla. 2005)(emphasis added). The cumulative errors demonstrated counsel's failure to challenge the State's case which was prejudicial. This Court "referenced further guidance it provided regarding the harmless error analysis as follows:

> We are not nor do we consider ourselves a super-jury; rather, we are an appellate tribunal charged with the task of determining "whether there is a *reasonable possibility* that the error affected the verdict." If such a possibility exists, it is our duty to remand for a new trial, which shall be free from the offending error. *The test is not whether the jury reached what we believe to be the correct result but is, instead, whether a reasonable possibility exists that the constitutional violation contributed to the defendant's convictions"*

Id. citing Ventura v. State, 29 So.3d 1086, 1090-1091 (Fla. 2010) *quoting Rigterink v. State,* 2 So.3d 221, 255-57 (Fla. 2009)(emphasis in original). Jackson was prejudiced because the individual and cumulative effect of the errors undermined

the confidence in the verdict. *See Strickland*, 466 So.2d at 694 & *see Braddy*, 2012 WL 5514368, *43-53(*Pariente, J., dissenting*). The court's ruling should be reversed and Jackson should be granted a new trial.

Claim 15 argued that counsel failed to conduct an effective, coherent and competent closing. (PV11, 1532-1535). The court erroneously held that counsel's closing was "logical, coherent and not deficient. (PV16, 2525). The role of counsel during closings is "to assist the jury in analyzing that evidence, not to obscure the jury's view with personal opinion, emotion, and nonrecord evidence." *Johns,* 832 So.2d at 963 *quoting Ruiz*, 743 So.2d at 4. Closings are an essential part of the trial proceedings where counsel can look into the jurors' eyes and argue to them to save the client's life.

Keating presented numerous implausible alternative theories of defense that include the serial killer defense, the catch and release defense, that "Montana" may have committed the crime, the defense that someone retaliated against Paulk for giving him/her AIDS, the defense that someone killed Paulk in another county and brought her body to Daytona Beach, and the defense that some unknown third party committed the crime because of Paulk's risky lifestyle. (RV25, 1313-1350). Specifically, the "catch and release" theory of defense undermined his own argument by admitting that Jackson may have committed the kidnapping. (RV25, 1323-1325, 1334, 1337 & 1339). Such a conflicted argument is not a reasonable

tactical decision when Jackson can be convicted under the Felony Murder rule. It is not reasonable trial strategy to throw numerous unreasonable alternative theories of defense at the jury because it injures defense's credibility with the jury. Counsel did not address or argue for lesser offenses. Counsel incorrectly argued that independent act [jury instruction] was a defense. (RV25,1324).

Counsel failed to offer a consistent and coherent theory of defense and his performance fell below the ABA guidelines as established in 2003 ABA Guideline 10.10.1 (B), 99 (2003); *see also commentary,* 99. He failed to properly attack the credibility of the prosecution witnesses and focused too much on an elusive unknown third party who committed the crime because of Paulk's risky lifestyle. His deficient performance prejudiced Jackson because this is his last opportunity to directly speak to the jury and to persuade them as to weakness in the prosecution's case and why his client should not be found guilty. The closing remarks failed to effectively challenge the State's evidence because it did not present a coherent and consistent defense which prejudiced Jackson by undermining his credibility with the jury. *See Downs*, 453 So.2d at 1108 *quoting Strickland*, 466 U.S. at 694 & *see Strickland*, 466 So.2d at 688. The court erred in finding that these several theories woven into the closing argument was logical, coherent, and not ineffective. The court's ruling should be reversed and a new trial be granted.

Claims 16, 20, and 21 relate to the effect of the cumulative errors

committed in the guilt phase, the penalty phase, and in both the guilt and penalty phase, respectively. Jackson did not receive a fundamentally fair trial entitled under the 6th, 8th and 14th Amendments of the U.S. Constitution. *See Heath v. Jones*, 941 F.2d 1126 (11th Cir. 1991) & *Derden v. McNeel*, 938 F.2d 605 (5th Cir. 1991). The court erroneously denied these claims. The sheer number and types of errors in Jackson's guilt and/or penalty phases, when considered as a whole, virtually dictated the sentence of death. While there are means for addressing each individual error, addressing these errors on an individual basis will not afford adequate safeguards required by the Constitution against an improperly imposed death sentence. Repeated instances of ineffective assistance of counsel significantly tainted Jackson's guilt and penalty phase. The errors are incorporated into these claims and include but are not limited to counsel's failure to investigate and present Lewis; failure to investigate and present a reasonable defense; failure to conduct an effective voir dire; failure to object to the prosecution's closing remarks; for failure to severe the defendants; failure to DNA test the head hairs; failure to effectively investigate the victim's background; failure to impeach Hunt and Miles; failure to conduct a proper and coherent closing; failure for accepting the PRR qualification; failure to investigate and present the history of substance abuse mitigation; and all others pled in the motion to vacate and in this brief. These errors are not harmless and their cumulative effect denied Jackson of his

fundamental rights. *See DiGuilio*, 491 So.2d 1129; *see Ray v. State*, 403 So.2d 956 (Fla. 1981); *see Taylor v. State*, 640 So.2d 1127 (Fla. 1st DCA 1994); *see Stewart v. State*, 622 So.2d 51 (Fla. 5th DCA 1993) & *see Landry v. State*, 620 So.2d 1099 (Fla. 4th DCA 1993). Jackson requests this Court reverse the court's rulings and grant him a new guilt and/or penalty phase(s).

Claims 22[8] and 23[9] were denied by the court because they were not ripe. These claims are raised in this appeal to continue to preserve them for further possible appeals in the state and federal courts. (PV16, 2526-2527).

ARGUMENT III

THE POST-CONVICTION COURT ERRED IN SUMMARILY DENYING A NUMBER OF JACKSON'S GUILT AND PENALTY PHASE CLAIMS THAT WERE RAISED IN HIS MOTION TO VACATE JUDGMENT AND SENTENCE PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851.

(a) Introduction

A court can deny a claim without an evidentiary hearing "where 'the motion, files, and records in the case conclusively show that the movant is entitled to no relief.'" *Mungin v. State*, 932 So.2d 986, 995 (Fla. 2006) *quoting* Fla. R. Crim. P. 3.850(d)(footnote omitted) & *see Gaskin v. State*, 737 So.2d 509, 516 (Fla. 1999).

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[8] Claim 22 argued that Fla.Stat. §945.10 deprived Jackson of his rights under the 5th, 6th, 8th and 14th Amendments to ensure his punishment is not cruel and unusual because it exempts from disclosure the identity of the executioner. (PCV11, 1545-1547).

[9] Claim 23 argued that per Fla.R.Crim.P. 3.811 and 3.812, a prisoner cannot be executed if "the person lacks the mental capacity to understand the fact of the impending death and the reason for it." (PCV11at 1548-1549) *See* Fla.Stat. §922.07 & *Martin v. Wainwright*, 497 So.2d 872 (1986).

Moreover, "[f]or all death case postconviction motions filed after October 1, 2001, Florida Rule of Criminal Procedure 3.851 requires an evidentiary hearing 'on claims listed by the defendant as requiring a factual determination.'" *Id.* at 995, n.8 *quoting* Fla.R.Crim.P. 3.851(f)(5)(A)(i).

(b) **Standard of Review**

To uphold the court's summary denial of claims raised pursuant to Fla.R.Crim.P. 3.851, a reviewing court looks at whether the claims are either facially invalid or conclusively refuted by the record. *See McLin*, 827 So.2d at 954 *quoting Foster v. Moore*, 810 So.2d 910, 914 (Fla. 2002) & *see Mungin*, 932 So.2d at 996. In post-conviction a defendant has the burden of establishing a legally sufficient claim. *See Mungin*, 932 So.2d at 996 *citing Freeman v. State*, 761 So.2d 1055, 1061 (Fla. 2000). If the court determines that the claim is legally sufficient, then the court "must [then] determine whether the claim is refuted by the record." *Id.* at 996 *citing Freeman*, 761 So.2d at 1061; *see Lemon v. State*, 498 So.2d 923 (Fla. 1986); *see Hoffmann v. State*, 613 So.2d 1250 (Fla. 1987) & *see O'Callaghan v. State*, 461 So.2d 1354 (Fla. 1984). The court must support its denial by either stating the rationale or by attaching to its order specific parts of the record that refute each claim presented in the motion. *See id.* at 995-996 *citing Anderson v. State*, 627 So.2d 1170, 1171 (Fla. 1993). Also "[t]he need for an evidentiary hearing presupposes that there are issues of fact which cannot be conclusively

resolved by the record." *Holland v. State*, 503 So.2d 1250, 1252-1253 (Fla. 1987). When a court summarily denies post-conviction relief without conducting a hearing, this Court must accept the defendant's "factual allegations as true to the extent they are not refuted by the record." *Rose v. State*, 774 So.2d 629, 632 (Fla. 2000) *receded from on other grounds by Guzman v. State*, 868 So.2d 498 (Fla. 2003); *see Mungin*, 932 So.2d at 996; & *see Hodges v. State*, 885 So.2d 338, 355 (Fla. 2004) *quoting Gaskin v. State*, 737 So.2d at 516 & *see Nordelo v. State*, 93 So.3d 178 (Fla. 2012). Moreover, "[w]hen a determination has been made that a defendant is entitled to an evidentiary hearing (as in this case), denial of that right would constitute denial of all due process and could *never* be deemed harmless." *Holland*, 503 So.2d at 1253. Factual allegations as to the merits of a constitutional claim and as to issues of diligence must be accepted as true and an evidentiary is warranted when the claims involve "disputed issues of fact." *Maharaj v. State*, 684 So.2d 726, 728 (Fla. 1996).

(C) **Argument**

Jackson was entitled to an evidentiary hearing because the claims raised and discussed below are legally sufficient and not refuted by the record. These claims argued that counsel was ineffective in violation of *Strickland*, the Florida Constitution and the U.S. Constitution. (PV11, 1475-1590). ***There were no records attached*** by the court (orally pronounced its ruling) to conclusively show that

Jackson was not entitled to any relief. The court summarily denied an evidentiary hearing on claims 2, 5, 7, 12, 13, 18, and 19. (PV1, 64-75, 86-94 & 105-118 & PV12, 1713-1715). Jackson refers to its arguments in the Motion to Vacate and at the case management conference to support that Jackson was entitled to an evidentiary hearing as to each claim denied[10].

Claim 2 argued that Jackson was entitled to a hearing because counsel failed to effectively question the venire about what constitutes non-statutory mitigators. This prejudiced Jackson and deprived him of his rights afforded by the 4th, 5th, 6th, 8th, and 14th Amendments to the U.S. Constitution and of his corresponding rights pursuant to the Florida Constitution. *See Strickland*, 466 So.2d 668. The court denied a hearing on this claim by erroneously siding with the State and finding that "there's an insufficient pleading and showing of any deficient performance of the trial counsel." (PV1,74-75).

The court erred in finding that claim 2 was insufficiently pled. The claim was sufficiently pled in accordance with Fla.R.Crim.P. 3.851(e)(1)[11]. (PV11,1486-1488). Jackson provided a factual basis by stating that the record on appeal showed that counsel did not ask the prospective jurors any specific questions regarding the

[10] Specifically claims 2, 5, 7, 12, and 18.

[11] The rule requires that the motion contain either a detailed allegation of the factual basis for any claim for which an evidentiary hearing is sought, or a detailed allegation as to the factual basis for any purely legal or constitutional claim for which an evidentiary hearing is not required and the reason that this claim could not have been raised on direct appeal. Fla.R.Crim.P. 3.851(e)(1)(D) &(E).

importance of mitigation in sentencing, such as whether they are able to consider neglect and abandonment during childhood as mitigating evidence; whether they are able to consider an abusive childhood as mitigating evidence; whether they are able to consider mental health issues such as Bipolar Disorder as mitigating evidence; whether they are able to consider substance abuse as mitigating evidence; whether they are able to consider a person's familial bonds as a mitigating evidence; whether they are able to consider that a person has young children as whether they are able to consider; whether they are able to consider that a person's community ties and work in the community as mitigating evidence; and whether they are able to consider that a person would spend his life in prison if sentenced to life. (PV1, 65-69 & 72-74). *See McCleskey*, 481 U.S. 279, 107 S.Ct. 1756 (1987) & *see Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954 (1978). The record does conclusively refute this factual basis. *See Ford v. State*, 825 So.2d 358 (Fla. 2002).

An evidentiary hearing was necessary to establish that counsel did not have sound trial strategy for failing to question the prospective jurors as to whether they would give meaningful consideration to his mitigating evidence. This would allow the court to find that there was deficient conduct and no reasonable strategy for not fully and effectively questioning the venire. A hearing was necessary to show counsel was ignorant for not questioning the jurors about mitigation that they can

consider in saving Jackson's life. *See* 2003 ABA Guideline §10.10.2 (B), 1000. An effective voir dire can uncover jurors who may refuse to consider valid mitigating evidence that could be beneficial to Jackson. *See Thompson v. State*, 796 So.2d 511 (Fla. 2001). Jackson was prejudiced because it was unknown whether the empanelled jurors would give meaningful consideration to mitigating. Jackson was deprived of a fair trial whose result is reliable. *See Strickland*, 466 U.S. at 686-687. The court's findings that the claim was insufficiently pled and that there is no showing of deficient performance (without stating its rationale) should be reversed and remanded for an evidentiary hearing. *See Mungin*, 932 So.2d at 995-996.

Claim 5 argued that Jackson was entitled to an evidentiary hearing because counsel failed to object and move for a severance of Jackson's case ***when*** Wooten testified about evidence of other crimes, wrongs, or acts which would have been inadmissible to show bad character or propensity, against Jackson. (PV11, 1493-1497 & PV1, 87-93). Wooten's testimony indicated that Jackson had a propensity to associate with or possess guns and that Jackson had a propensity to seek revenge or retribution. (RV24, 1202, 1224, 1226 & 1228). This failure constituted prejudicial ineffective assistance of counsel whereby Jackson was deprived of his rights afforded by the 4th, 5th, 6th, 8th, and 14th Amendments to the U.S. Constitution and of his corresponding rights pursuant to the Florida Constitution. *See Strickland*, 466 So.2d 668. A hearing was necessary to show that counsel's

failure to move to severe the defendants was not reasonable trial strategy and constituted ineffective assistance whereby the jurors heard inadmissible bad character or propensity testimony which improperly influenced the verdict. The court denied a hearing on this claim finding that "as far as the pleadings and the record, there's not a lack of performance on the part of counsel." (PV1, 93).

The non-refuted record on appeal shows a lack of diligent performance contrary to the court's finding to contemporaneously object and move to severe the cases when inadmissible testimony was introduced via Wooten. *See Ford*, 825 So.2d 358. It shows that counsel filed a Motion in Limine Reference Defendant Possessing a Gun on Other Occasions. (RV1, 159-161). The prosecution responded in part that "as to case-in-chief evidence, the State has no intention of introducing ***any sort of propensity evidence to carry a gun or tendency to carry a gun***." (RV5, 810). The trial court granted Jackson's motion "to the extent that it be granted except if there is any testimony relating to Jackson allegedly having a gun on the date and incident." (RV5, 811 & RV3, 501). It is clear from the motion hearing that all parties agreed that evidence of Jackson possessing a gun on other occasion except the date of offense is evidence of other crimes, wrongs, or acts which is inadmissible if to show bad character or propensity. *See* C. Ehrhardt, Florida Evidence §404.9.

Wooten testified that Jackson possessed a gun on a date other than the date

of the offense with regard to the murder of his cousin. (RV24, 1202, 1224, 1226 & 1228). The testimony of the gun possession was un-objected and repetitive. At the first mention of the gun possession[12], counsel should have immediately objected and moved for a severance of the defendants and requested a mistrial because of the introduction of evidence to show a propensity of Jackson to associate or possess guns. Wooten also testified that Jackson was associated with guns to seek retribution for his cousin's death. (RV24, 1226)[13]. All these references to Jackson

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[12] "Q. And the telephone call on April the 22nd, what do you think you're talking about when you're responding to Mr. Hunt's questions?
A. I thought he was talking about the incident with Ray's cousin getting killed in Melbourne, what happened. And I remember having a discussion about that. It had to be one of the weekends that I came down, and I was out seeing Cecelia. And I spoke with Ray, and he was saying that ***his cousin had got killed in Melbourne, and he wanted to go down there and find out what was going on.***
So Latisha's boyfriend, Dewayne, they was all out there, talking, and ***he went upstairs and got some guns and whatnot and he came back down and put the guns in the trunk. And he – he asked Ray was they ready to go.***. . . .
You can't – you know, if your cousin is dead, he's dead. ***You can't – you can't worry about that. You can't bring that back. Just leave that stuff alone.***" (RV24, 1202).

[13] A. And he [Jackson] said, "I think it got something to do with, you know, his cousin getting killed or something like – somebody getting killed." You know what I mean?
He went down there. So I'm assuming that, okay, I know his cousin got killed, I know he wanted to go down there, but I'm assuming, okay, ***maybe he went down there and something happened and somebody got shot or whatnot.*** And people are thinking that they saw -- when they – you know, when they saw Tisha's boyfriend and ***them out there with the guns and whatnot***, that I got in the car and left with them." (RV24, 1224).

being involved with guns on another occasion should have been objected to contemporaneously by counsel because it permitted the admission of evidence of other crimes, wrongs, or acts that show that Jackson has a propensity to carry or be associated with guns. Counsel should have also moved for severance of the cases. *See* Fla.R.Crim.P. 3.152(b). Wooten's testimony showed that Jackson has a propensity for violence and to seek revenge or retribution which is highly prejudicial in this case. The prosecution's theory was that Jackson kidnapped and killed Paulk as retribution for her stealing money and drugs. *See Jackson*, 25 So.3d at 522. Furthermore, the prosecution presented evidence through Morris that Jackson had a gun on November 9, 2004. (RV18, 340 & 343-344).

The record also shows a further lack of performance by counsel when they failed to make the appropriate argument for severance during an evidentiary hearing about the controlled call between Hunt and Wooten. (RV19, 412-417). Wooten argued that the statement "This is what Ray said in the paper. They're saying it was --it was -- it was him, his brother and another man also in the

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"A. I don't – you could say that. But, the same time, if I'm – if I'm assuming that's what he's talking about, that's what I think he's talking about. I know he was upset. I know, you know, Ray was upset about his cousin getting killed. He was wanting to go down there and find out what was going on. The other dudes, ***them wanted to grab guns, and they put the guns in***. I'm like, 'Man, listen, man, leave all that stuff alone, stop hanging around them people.'" (RV24, 1226).

"A. Because he knew that I was there when I was talking to Ray, because I told you I pulled Ray to the side from the guys, and ***I just told him to leave that stuff alone***." (RV24, 1228).

apartment" was a *Bruton* violation. (RV19, 412-413). The prosecution agreed to remove the mention of "Ray" to avoid the *Bruton* issue. Counsel should have objected here and requested a motion to sever Jackson's pursuant Fla.R.Crim.P. 3.152, whereby a joint trial would not allow a fair determination of guilt or innocence. The controlled call[14] is inadmissible hearsay against Jackson and a jury would attribute its contents to Jackson because of the joint trial. Thus, Jackson was deprived of a fair determination of the guilt or innocence in accordance with Fla.R.Crim.P. 3.152.

A motion for severance was necessary to achieve a fair determination of the guilt or innocence of Jackson. Counsel could not have anticipated that Wooten would testify about Jackson's propensity to associate with or possess guns and for retribution. However, "a motion for severance must be made either before trial or when the facts establishing the grounds are known to the defendant." *Cherry v. State*, 835 So.2d 1205, 1207 (Fla. 4th DCA 2003). Counsel was deficient for failing to challenge the admission of this prejudicial testimony by failing to object and/or to move for an immediate severance of Jackson's case. *See Strickland*, 466 So.2d at 688. Moreover, a "motion to sever should be granted when the evidence sought to be admitted applies only to a co-defendant, but which may improperly

[14] The call was illegal because Hunt acted as an agent of law enforcement when law enforcement paid for the phone call to Wooten. (RV22, 838-844) & s*ee State v. Moniger*, 957 So.2d 2 (Fla. 2d DCA 2007).

influence the jury as to the charge against the other defendant." *See Cherry*, 835 So.2d at 1207 *quoting Miller v. State*, 756 So.2d 1072, 1072 (Fla. 4th DCA 2000) & *see Hernandez v. State*, 570 So.2d 404 (Fla. 2d DCA 1990).

The jury considered the evidence of other crimes, wrongs, or acts Wooten presented against Jackson. This is not conclusively refuted by the record. Jackson was prejudiced as this evidence portrayed Jackson as a person who is known to associate or possess guns and has a propensity to seek retribution. An "error involving misjoinder 'affects substantial rights' and requires reversal only if misjoinder results in actual prejudice because it 'had substantial and injurious effect or influence in determining the jury's verdict." *U.S. v. Lane*, 474 U.S. 438, 449 106 S.Ct. 725, 88 L.Ed. 2d 814 (1986) *quoting Kotteakos v. U.S.*, 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). Wooten's testimony had a substantial influence on Jackson's verdict as it painted him as a "violent" person with guns and a retribution seeker, thus but for counsel's unprofessional errors, the result of the proceeding would have been different. *See Strickland*, 466 So.2d at 694. The court's findings should be reversed and remanded for a hearing.

Claim 7 that was erroneously denied an evidentiary hearing is related to Jackson's Motion for post-conviction DNA. (PV1, 94 & PV10, 1360-1424 & 1462-1467). This argument is related to Argument IV in this brief. (PV1, 30-34 & PV12, 1685-1689) & *see Skinner*, 131 S.Ct. 1289 (Federal civil claim where a

convicted state prisoner may seek DNA testing of crime-scene evidence as a matter of due process). The prosecution made the 3 head hairs found an issue in their case in chief by eliciting testimony about the hairs from Analyst Kelly May ("May"), the senior crime lab analyst for FDLE at the Daytona Beach Crime Lab. (RV17, 193-194 & RV23, 1002-1013). May agreed that head hairs are easily transferable to the grave site and that the perpetrator could have easily transferred his head hair to the grave site, including a Caucasian perpetrator. (RV23, 1019). These hairs were suitable for microscopic comparison but counsel never sought comparison or DNA testing of them to exclude Jackson and to potentially incriminate another individual. (RV23, 1004-1005 & 1013-1015). A DNA comparison of the hairs could have led to the identification of the true assailant(s) and undermined testimony that Jackson committed this crime. It could have also supported counsel's defense that a third party committed the crime.

Counsel also failed to request the exclusion of the head hair evidence based on relevance, as it does not have any probative value. C. Ehrhardt, Florida Evidence §90.403. In lieu of seeking DNA comparison, counsel opted to unreasonably argue that the person with the Caucasian hair was someone named Montana and a potential suspect (RV25, 1342 & 1343). If counsel did not wish to compare or DNA test the hairs, counsel should have moved to exclude the hairs because they were not relevant instead of using the hairs to support an

unreasonable theory of defense that some unknown third party committed the crime and it could be Montana, who contributed to the Caucasian, yet disregarding the Negroid hair(s) that could reasonably be inferred to be Jackson's. The prosecution in closing attacked the hair evidence they introduced as not relevant. (RV25, 1388-1389). Regardless, of the argument that the hairs do not matter, the prosecution introduced the description of the head hairs to bolster the inference that the Negroid hairs belonged to the perpetrator and Jackson is an African-American, so it is Jackson's hair. Jackson was prejudiced by counsel's failure to request comparison and DNA testing of the head hairs found in Paulk's grave. Such testing would have excluded Jackson as the assailant instead of including him as possible donor of the Negroid hair(s). *See Skinner*, 131 S.Ct. 1289. The court denied this claim based on its denial of Jackson's post-conviction DNA motion. (PV1, 94). The court's findings should be reversed and remanded for a microscopic and DNA analysis and an evidentiary hearing.

Claim 12 argued that Jackson was entitled to an evidentiary hearing because counsel failed to impeach prejudicial hearsay testimony by Hunt that Jackson's wife told him that Jackson threatened to kill him. (RV22, 947 & 950) & (PV1, 105-109 & PV11, 1524-1526). Counsel also failed to impeach Miles with a transcription of her video-recorded interview or the DVD recording. (RV23, 1000-1001). The court denied this claim finding that "on the face of the pleadings the

Defense has failed to make an argument and showing what those persons would say and how it would be effective." (PV1, 109). Jackson was deprived of his rights afforded by the 4th, 5th, 6th, 8th, and 14th Amendments to the U.S. Constitution and of his corresponding rights pursuant to the Florida Constitution. *See Strickland*, 466 So.2d 668.

The factual basis of the motion was sufficiently pled. *See* Fla.R.Crim.P. 3.851(e)(1)(D)&(E). Jackson stated that Mrs. Jackson was presented to impeach the highly prejudicial hearsay statement by Hunt that she told him that Jackson threatened to kill him. (RV22, 950). Jackson asked for a hearing to establish that Mrs. Jackson (who did testify, the hearing) was willing and available to impeach Hunt's false hearsay statements. (PV11, 1525-1526). Jackson also requested in his motion a hearing to present evidence of Miles' statement during her July 15, 2005, video-recorded interview that "he don't know what happened to her," which counsel failed to have transcribed. (PV11, 1525). This should have been used to impeach her trial testimony when she denied saying in her interview that "he [Ray] don't know what happened to her the victim." (RV23, 1000-1001) & (PV11, 1525). Also, counsel failed to play-back Miles' statement from the video recording to impeach her prior inconsistent statement. The motion is clearly sufficiently pled as to what evidence Jackson wished to put on, the hearing in accordance with Fla.R.Crim.P. 3.851(e) & *see Nelson v. State*, 875 So.2d 579, 583-584 (Fla. 2004).

Jackson was prejudiced by counsel's failure to impeach this highly prejudicial testimony. The threatening nature of the hearsay testimony portrayed Jackson as having a consciousness of guilt and also created the reasonable inference that Jackson was a "violent" and threatening individual and was involved in the kidnapping and murder. Counsel's error was so egregious that counsel was not functioning as the 'counsel' guaranteed the defendant by the 6th Amendment and deprived the defendant of a fair adversarial trial. *See Strickland*, 466 So.2d at 687 & *see Downs*, 453 So.2d at 1108-1109. The court's denial should be reversed and remanded for a hearing.

Claim 18 argued that Jackson was entitled to a hearing because counsel should not have alleviated the State's burden to prove that he qualified as PRR. *See* Fla.Stat. §775.082(9). (PV1, 113 & PV11, 1540-1541). This failure deprived Jackson of his procedural due process rights afforded by the 4th, 5th, 6th, 8th, and 14th Amendments to the United States Constitution and of his corresponding rights pursuant to the Florida Constitution. *See Strickland*, 466 So.2d 668. The court denied this claim stating "on its face, has failed; there's no proper allegations of improper performance on part of the counsel and no showing that there would have been any prejudice, had he forced the State to prove up prisoner release reoffender." (PV1, 115).

Jackson pled improper performance by counsel for failing to subject the state

of its burden of proving PRR by a preponderance of evidence. Counsel did not obtain his client's consent to alleviate the state's burden. (PV11, 1541). The non-refuted record shows that counsel requested the court take judicial notice of the date of release and the date of offense for the kidnapping. (RV15, 2425). Whereby, the prosecution easily proved up the PRR designation by using certified and signed copies of the date of release from the DOC. (RV15, 2424-2426). Counsel failed to be an adversary by allowing the court to take judicial notice and by not making the state abide by its burden. *See Smith v. State*, 990 So.2d 1162 (Fla. 2008); *see Davenport v. State*, 971 So.2d 293 (Fla. 2008); *see Sinclair v. State*, 853 So.2d 551 (Fla. 2003); *see Gray v. State*, 910 So.2d 867 (Fla. 1st DCA 2005) & *see Yisrael v. State*, 993 So.2d 952 (Fla. 2008). An evidentiary hearing was requested to show that counsel was unreasonable in failing to object to the State's introduction of documents in lieu of presenting witnesses. The prejudice was that the court did not assess whether the State had met its burden and thus possibly excluded the PRR sentence. The court's ruling should be reversed and remanded for a hearing.

ARGUMENT IV

THE POST-CONVICTION COURT ERRED IN DENYING JACKSON'S MOTION FOR POST-CONVICTION DNA TESTING PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.853.

(A) Introduction and Standard of Review

Fla.Stat. §925.11(1) governs motion for post-conviction DNA analysis and the standard of review in assessing these motions is set out as follows:

> [i]n order to be entitled to postconviction DNA testing, a defendant's motion must include 'a description of the physical evidence containing DNA to be tested and, if known, the present location or last known location of the evidence and how it originally was obtained.' Fla.R.Crim.P. 3.853(b)(1). The motion must also allege that the evidence was not previously tested or that the results of such testing were inconclusive. Fla.R.Crim.P. 3.853(b)(2). Additionally, a defendant's motion must explain how the DNA testing requested will exonerate the defendant or mitigate the defendant's sentence. Fla.R.Crim.P. 3.853(b)(3)-(4). A defendant's motion 'is facially sufficient with regard to the exoneration issue if the alleged facts demonstrate that there is a reasonable probability that the defendant would have been acquitted if the DNA evidence had been admitted, trial.' *Knighten v. State,* 829 So.2d 249, 252 (Fla. 2d DCA 2002). 'The clear requirement of [the] provisions [of rule 3.853] is that a movant ... must lay out with specificity how the DNA testing of each item requested to be tested would give rise to a reasonable probability of acquittal or a lesser sentence.' *Hitchcock v. State,* 866 So.2d 23, 27 (Fla. 2004). Further, 'the movant must demonstrate the nexus between the potential results of DNA testing on each piece of evidence and the issues in the case.' *Id.*

Bates v. State, 3 So.3d 1091, 1098 (Fla. 2009)(internal quotations and citations in original) & *see* Fla.R.Crim.P. 3.853.

(B) Argument

Jackson has continuously maintained his innocence. The court denied Jackson's Motion for post-conviction DNA analysis of the head hairs because the court found that Jackson "[had] not met his burden of proof under §925.11 Fla. Stat. or Rule 3.853, Fla.R.Crim.P. . . A defendant has the burden to show that there may be DNA which would exonerate him or mitigate his sentence." (PV1, 30-34 &

PV12, 1685-1689) & *see* Fla.R.Crim.P. 3.853(3)[15].

Jackson argued that the DNA results would exonerate him and provide the true assailant's identity. (PV1, 15-20). Jackson was not linked to Paulk's body by any physical evidence. The evidence consisted entirely of the testimony of cooperating witnesses. Hunt testified that he helped Jackson place Paulk into the trunk and then he watched Jackson leave in the car. (RV21, 767-776). Hunt testified that Jackson started closed-fist punching Paulk in her face, but there were no signs of injury or trauma on her skull. (RV18, 247, 251-252, 259, & 261 & RV21, 771-772). The medical examiner testified that the skull was intact and that he would be able to detect any gunshot wound, stab wound or blunt force to the head that would cause her death. (RV18, 252). Therefore, Hunt's credibility is again in question. (RV22, 833-838 & 931-932).

The microscopic comparison and DNA comparison of the Negroid hairs to Jackson and the DNA comparison of all the three hairs to the FDLE and/or FBI DNA databases can provide irrefutable evidence of the true assailant(s) and would undermine the State's case. This DNA evidence would, least mitigate Jackson's sentence of death by bringing into question the reliability of the witnesses' statements and the guilty verdict. Today and, trial, the disputed issue of identity of

[15]"Rule 3.853 does not require a movant to allege that previously untested evidence would be conclusive, and it does not provide conclusiveness as a factor to be considered in determining whether a movant is entitled to DNA testing." *Schofield v. State*, 861 So.2d 1244, 1246 (Fla. 2003).

the true assailant(s) remains. It is well established that even where evidence against a defendant is far more overwhelming than that offered, identity is still a "disputed issue" under Fla.R.Crim.P. 3.853(b)(4) provided that the defense denied that the defendant had committed the crime. *See e.g. Huffman v. State*, 837 So.2d 1147 (Fla. 2d DCA 2003); *see Zollman v. State*, 820 So.2d 1059, 1062 (Fla. 2d DCA 2002) & *Knighten,* 829 So.2d at 251. Jackson had met his burden.

The potential significance of exclusionary DNA is so great that such results would more likely have led a jury to harbor, least a reasonable doubt about guilt, and acquit him. At the very least, DNA test results which excluded Jackson from these critical items of crime scene evidence and pointed to another perpetrator would cast grave doubt on his guilt. Jackson's request for DNA testing is therefore "facially sufficient," and satisfies Rule 3.853. There is a credible concern that an injustice may have occurred and DNA testing may resolve the issue[16].

In addition the denial to submit this DNA evidence for testing at Jackson's expense violates his civil rights under the due process and equal protection clauses of the Florida and U.S. Constitutions. *See Skinner*, 131 S.Ct. 1289. (PV1, 20-21). This specific argument raised in Jackson's post-conviction DNA was not addressed

[16] *Holmes v. South Carolina*, 547 U.S. 319, 126 S. Ct. 1727 (2006), presents clear implications for defendants like Jackson to obtain DNA evidence that a third party may have committed the crime. *Holmes* gave the statutory request for DNA testing substantial additional weight, because of the fundamental constitutional right to present evidence of third party guilt. *See id.* at 805-806.

by the court in its order. (PV12, 1685-1688). A defendant has the fundamental right to present potentially exculpatory evidence. *See Rivera v. State,* 561 So.2d 536, 539 (Fla. 1990). As a matter of due process, Jackson was entitled to a post-conviction DNA comparison. *See Skinner*, 131 S.Ct. 1289.

Despite Jackson's innocence, counsel failed to request that the head hairs be tested. This was ineffective as argued in Argument III. The court's ruling should be reversed and remanded for Jackson to conduct a mitochondrial DNA analysis via FDLE DNA database and a FBI DNA database, including CODIS, that is available for the DNA testing and comparison of the head hairs.

CONCLUSION

Based on the arguments and the records on appeal, the court improperly denied Jackson post-conviction relief by improperly denying Jackson's Motion to Vacate and Jackson's Motion for Post-conviction DNA testing. Jackson requests that this Court reverse the court's order denying relief, vacate his conviction and grant his a new trial; or grant him an evidentiary hearing on claims summarily denied; or grant such other relief as this Court deems just and proper. Jackson also respectfully requests that this Court reverse the court's denial for post-conviction DNA testing and remand this case to allow Jackson to conduct DNA testing.

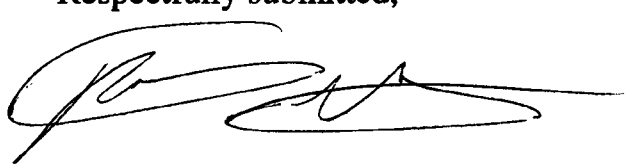
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of the Appellant has been furnished by United States Mail to Ray Jackson, DOC # 973885, Union Correctional Institution, 7819 NW 228th Street, Raiford, Florida 32026 on this 11th day of December, 2012.

I HEREBY CERTIFY that a PDF copy of the foregoing was served via electronic mail to **Kenneth Sloan Nunnelley**, Senior Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118, at ken.nunnelley@myfloridalegal.com and at CapApp@myfloridalegal.com on this 11th day of December, 2012.

I HEREBY CERTIFY that, in compliance with this Honorable Court's Administrative Order *In Re: Mandatory Submission of Electronic Copies of Documents*, AOSC04-84, dated September 13, 2004, a copy of the Microsoft Word document of the foregoing brief has been transmitted in an electronic format to this Court's electronic mail at e-file@flcourts.org on this 11th day of December, 2012.

Respectfully submitted,



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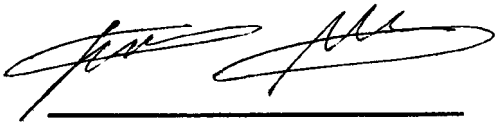
CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to Fla.R.App.P. 9.210, that the foregoing was generated in Times New Roman 14 point font.

Respectfully submitted,



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